125-181

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 189.

THE PEMBINA CONSOLIDATED SILVER MINING AND MILLING COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

FILED NOVEMBER 28, 1884.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, JANUARY 3, 1888.

1 *Appeal from Settlement of State Treasurer and Auditor General.*

The answer of the justices of the supreme court of Pennsylvania to the writ of error from the Supreme Court of the United States, hereunto annexed, as follows, to wit:

Pembina Consolidated Silver Mining and Milling Company in account with the Commonwealth of Pennsylvania, Dr.

For office license per sec. 16, act of 7 June, 1879, as per application herewith filed, from July 1st, 1881, to July 1st, 1882:

Total authorized capital stock	$1,000,000
License fee, at rate of one-fourth mill on each dollar of authorized capital	250 00
Penalty for failure to take out license	125 00
Due Commonwealth	$375 00

AUDITOR GENERAL'S DEPARTMENT,
HARRISBURG, *Oct.* 20, 1881.

Settled and entered.
(Signed) ROB'T. S. FRAZER,
For JOHN A. LEMAR,
Auditor General.

Approved Oct. 27, 1881.
(Signed) W. LIVESEY,
For SAM'L BUTLER,
State Treasurer.

2 Copy certified from auditor general's department November 1st, 1881.
(Signed) THOMAS M'CAMANT,
For JOHN A. LEMAR,
Auditor General.

And now, November 25th, 1881, the Pembina Consolidated Silver Mining and Milling Company hereby appeals from the above-stated settlement made by the auditor general and State treasurer of the Commonwealth of Pennsylvania against the said corporation under the sixteenth section of an act of the General Assembly of the Commonwealth of Pennsylvania entitled "An act to provide revenue by taxation," approved the seventh day of June, anno Domini 1879, and states and shows here the following objections thereto:

1. That the said sixteenth section of the said act of 7th June, A. D. 1879, entitled "An act to provide revenue by taxation," is void in law, as being in contravention of the provisions of article I, section VIII, clause 4, of the Constitution of the United States, wherein it is provided that "Congress shall have power to regulate commerce with foreign nations and among the several States."

3 2. That the said sixteenth section of the act of June 7th, 1879, entitled "An act to provide revenue by taxation," is void in law, as being in contravention of the provisions of article IV, section 11, clause 1, of the Constitution of the United States, wherein it is provided that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

3. That the provisions of the said sixteenth section of the act of June 7th, A. D. 1879, entitled "An act to provide revenue by taxation," are contrary to article IX, section 1, of the constitution of the Commonwealth of Pennsylvania, wherein it is provided that "all taxes shall be uniform on the same class of subjects within the territorial limits of the authority levying the tax."

4. That the said Pembina Consolidated Silver Mining and Milling Company is not "a foreign corporation" within the meaning of the said act of the General Assembly of the Commonwealth of Pennsylvania entitled "An act to provide revenue by taxation," approved the 7th day of June, A. D. 1879.

4 5. That the penalty charged in the said above settlement by the auditor general and State treasurer against the said Pembina Consolidated Silver Mining and Milling Company was not lawfully due and chargeable against the said corporation at the time the said account was settled against them.

[Seal of Pembina Consolidated Silver M. & M. Co.]

JAMES W. LATTA, *President.*
BEN. P. WRIGLEY,
Of Counsel for Appellant, Pembina Consolidated Silver M. and M. Co.

Attest: LEWIS C. GREEN, *Secretary.*

(Endorsement on appeal:) Commonwealth of Pennsylvania *v.* Pembina Consolidated Silver Mining and Milling Company. No. 454. April term, 1882. Appeal from settlement of auditor general and State treasurer. Filed March 3d, 1882. Filed in the office of the aud. gen. the 7th day of Dec., 1881. Rob't S. Frazer, for John A. Lemar. B. P. Wrigley, for appellant.

Narr. and Copy of Account.

In Dauphin Common Pleas. April Term, 1882. No. 454.

5 DAUPHIN COUNTY, *ss:*

The Commonwealth of Pennsylvania, by her attorney general, complains of the Pembina Consolidated Silver Mining & Milling Company of a plea that they render unto the said Commonwealth the sum of one hundred thousand dollars, lawful money of the United States, which they owe to and unjustly detain from her, for that whereas the said defendants, on the 20th day of October, A. D. 1881, at the county of Dauphin aforesaid, were indebted to the said plaintiff in the sum of three hundred and seventy-five dollars, lawful money of the United States, on an account examined, ad-

justed, settled, and signed by the auditor general of this Commonwealth and duly entered in the books of his office, as authorized and required by law, on the day and year last aforesaid, in which a certain sum of money, to wit, the sum last aforesaid, is due and owing the said plaintiff from the said defendants, with interest thereon at the rate of twelve per centum per annum from and after the expiration of two months from the day upon which the
6 said account was so as aforesaid examined, adjusted, settled, and signed by the auditor general of this Commonwealth, for office license, as per act of June 7th, 1879, from July 1, 1881, to July 1, 1882, which said account was, on the 27th day of Oct. A. D. 1881, submitted to, revised, and approved by the State treasurer, and a copy thereof, within thirty days thereafter, sent by the said auditor general, under his hand and seal of office, to the said defendants, and which yet remains in full force against the said defendants and unappealed from, whereby, and by force of the statute in such case made and provided, an action hath accrued to the said plaintiff to demand and have of and from the said defendants a certain sum of money, to wit, the sum mentioned and ascertained to be due to this Commonwealth in the said account so as aforesaid examined, adjusted, settled, and signed by the auditor general of this Commonwealth, parcel of the said sum above demanded; and, being so indebted, the said defendants afterwards, to wit, on the day and year aforesaid, at the county aforesaid, promised to
7 pay to the said plaintiff on request the last-mentioned sum of money.

And whereas, also, the said defendants, on the day and year in the first count mentioned, at the county aforesaid, were indebted to the said plaintiff in a certain further sum of money, to wit, the sum mentioned and ascertained to be due to this Commonwealth in the said account in the first count mentioned for money then and there had and received by the said defendants to and for the use of the said plaintiff, and also a certain further sum of money, to wit, the sum last aforesaid, and on an account settled and entered by the auditor general of this Commonwealth against the said defendants on the day and year in the first count mentioned for office license, and approved by the State treasurer on the day and year in the first count mentioned;

And whereas afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, the said defendants, in consideration of the premises, promised to pay the two last-mentioned several sums of money, respectively, to the said plaintiff on request;
8 yet the said defendants have disregarded their said promise, and, although often requested so to do, have not, as yet, paid any of the said several sums of money or any part thereof, to the damage of the said plaintiff of one hundred thousand dollars, and therefore she brings suit, &c.

ROBERT SNODGRASS,
Dep'ty Att. Gen'l,
For HENRY W. PALMER,
Attorney General.

Pembina Consolidated Silver Mining and Milling Company in account with the Commonwealth of Pennsylvania, Dr.

For office license tax per sec. 16, act of 7th June, 1879, as per application herewith filed, from July 1st, 1881, to July 1st, 1882:

Total authorized capital stock	$1,000,000 00
License fee, at rate of one-fourth mill on each dollar of authorized capital	250 00
Penalty for failure to take out license	125 00
Due Commonwealth	$375 00

AUDITOR GENERAL'S DEPARTMENT,
HARRISBURG, *Oct.* 20, 1881.

9 Settled and entered.

ROBERT S. FRAZER,
For JOHN A. LEMAR,
Auditor General.

TREASURY DEPARTMENT OF PA.,
HARRISBURG, *Oct.* 27, 1881.

Approved.

W. LIVESEY,
For SAM'L BUTLER,
State Treasurer.

AUDITOR GENERAL'S DEPARTMENT,
HARRISBURG, *Dec.* 19*th*, 1882.

I hereby certify that the above is a true copy of the original remaining on file in this department.

Witness my hand and the seal of office the day and year aforesaid.

[Seal of Auditor General.]

THOMAS M'CAMANT,
For JOHN A. LEMAR,
Auditor General.

(Endorsement on narr. and copy of account:) No. 454. April term, 1882. Commonwealth of Pennsylvania *v.* Pembina Consolidated Silver Mining and Milling Co. Narr. and copy of account. Filed Dec. 19th, 1882.

Registry.

PHILADELPHIA, *Oct.* 3, 1881.

To the Hon. John A. Lemar, auditor general.

SIR: In compliance with the requirements of the first sec-
10 tion of an act of the General Assembly of Pennsylvania, entitled "An act to provide revenue by taxation," approved June 7th, A. D. 1879, I hereby certify for registration in your office the following information concerning the company hereinafter named:

Name of company: Pembina Consolidated Silver Mining and Milling Company.

Act of Assembly or authority under which organized or incorporated: Under the laws of the State of Colorado.

Date of incorporation or organization: May 31, 1880.

Place of business: Alpine Chaffee Co., Colorado.

Amount of capital authorized: $1,000,000.

Amount of capital paid in: $49,989.63, not assessable.

Name and P. O. address of president: James W. Latta, 128 S. Sixth St.

Name and P. O. address of secretary: Lewis C. Green, 154 S. 4th St.

Name and P. O. address of treasurer: W. Ferre Lightner, 639 Callowhill St.

[SEAL OF CO.] LEWIS C. GREEN,
President, Secretary, & Treasurer.

11 (Endorsement on registry:) Registry of Pembina Consolidated Silver Mining and Milling Company under sec. 1st act of June 7th, 1879. Filed in the auditor general's office the 6th day of Oct., A. D. 1881.

Act of June 7th, 1879, entitled "An act to provide revenue by taxation."

SECTION 1. That hereafter no institution or company incorporated or organized by or under any law of this Commonwealth, general or special, or incorporated or organized under the laws of any other State and doing business in this Commonwealth, shall go into operation without first having the name of the institution or company, the date of incorporation or organization, the act of Assembly or authority under which incorporated or organized, the place of business, the post-office address, the names of the president, secretary, and treasurer, the amount of capital authorized by its charter, and the amount of capital paid into the treasury of the company registered in the office of the auditor general; and every institution or company now engaged in business in this Commonwealth
12 shall, within ninety days after the passage of this act, register as herein required in the office of the auditor general; and any such institution or company which shall neglect or refuse to comply with the provisions of this section shall be subject to a penalty of five hundred dollars, which penalty shall be collected on an account settled by the auditor general and State treasurer in the same manner as taxes on stocks are settled and collected.

AUDITOR GENERAL'S DEPARTMENT,
HARRISBURG, *March 3rd*, 1883.

I hereby certify that the foregoing is a true copy of the original remaining on file in this department.

Witness my hand and seal of office the day and year above written.

[Seal of Auditor General.]

ROB'T S. FRAZER,
For JOHN A. LEMAR,
Auditor General.

Agreement, &c.

In the Court of Common Pleas of Dauphin Co. April Term, 1882.

COMMONWEALTH OF PENNSYLVANIA
vs.
PEMBINA CONSOLIDATED SILVER MINING AND MILLING CO. } No. 454.

13 It is hereby agreed that a trial by jury be dispensed with in the above-stated case, and that the same be submitted to the decision of the court, to be heard and determined under the provisions of an act entitled "An act to provide for the submission of civil cases to the decision of the court, and to dispense with trial by jury," approved the 22nd day of April, 1874, subject, however, to a writ of error as in other cases, at the option of either party.

Dec. 18, '82.

ROB'T SNODGRASS,
Dep'ty Att. Gen'l.
BEN. P. WRIGLEY,
J. W. M. NEWLIN,
Att'ys Def'ts.

(Endorsement on agreement:) Com'th *v.* Pembina Mining Co. No. 454. Ap'l term, 1882. Agreement, &c. Filed Dec. 19, 1882.

Opinion of the Court of Common Pleas.

Dauphin Co. Common Pleas. Ap'l Term, 1882.

COMMONWEALTH
v.
PEMBINA CONSOLIDATED SILVER MINING & MILLING CO. } 454.

Appeal.

BY THE COURT:

14 This case was tried by the court by agreement of the parties. It is an appeal from a settlement made by the auditor general and State treasurer against defendant, dated Oct. 27, 1881, for a license fee of $250.00, and penalty for failure to take out license, $125.00, for the period from July 1, 1881, to July 1, 1882, as per sec. 16, act June 7, 1879.

Defendant is a Colorado corporation having an authorized capital of $1,000,000, not doing business in Pennsylvania, but having an office in Philadelphia for the use of its officers and stockholders.

All the questions raised in this appeal have been decided in the opinions filed in 19 Jan. T., 1883, and 64 Jan. T., 1882, both tried with this case, and for the reasons there given judgment must go against defendants.

The amount due is as follows:

Amount of settlement	$375 00
Int. from Dec. 27, '81, to Mar. 6, '83	53 37
Att'y gen'l's commission	18 75
Total	$447 12

For which sum judgment will be entered against defendant if exceptions be not filed according to law.

J. W. SIMONTON, *P. J.*

15 (Endorsement on opinion:) Commonwealth *v.* Pembina Consolidated Silver Mining & Milling Co. No. 454. Ap'l T., 1882. Opinion. Filed March 6, '83.

Exceptions.

Dauphin County Common Pleas. Ap'l Term, 1882.

COMMONWEALTH OF PENNSYLVANIA
v.
PEMBINA CONSOLIDATED SILVER MINING COMPANY. } No. 454.

Defendants except to the opinion and findings of the court herein because the learned judge erred in deciding—

I. That defendants are "a foreign corporation" within the meaning of the revenue act of 1879.

II. That the tax and penalty claimed are not in contravention of art. 9, section 1, of the constitution of Pennsylvania.

III. That the tax and penalty are not void as being contrary to the Constitution of the United States.

(*a.*) And are not an attempt to tax a franchise not granted by the Commonwealth of Pennsylvania.

16 (*b.*) Nor an attempt to tax property not within its jurisdiction.

(*c.*) Nor an attempt to tax business not carried on within its jurisdiction.

(*d.*) Nor an attempt to tax interstate commerce.

(*e.*) Nor an attempt to regulate interstate commerce.

And the learned judge erred in finding for plaintiff, notwithstanding the defendants' objection to the revenue act of 1879, that—

IV. The tax and penalty sought to be imposed infringe upon the provisions of the fourteenth amendment to the Constitution of the United States in this—

(*a.*) The appellant is a person within the meaning of that section.

(*b.*) The tax and penalty are void thereunder, because therein the appellant is denied "the equal protection of the laws," because—

(1.) Another class of foreign corporations, to wit, foreign insurance companies, is taxed on more favorable terms, which is an unlawful discrimination against appellant.

17 (2.) A corporation, on its property and business, can only be taxed on the same terms as individuals in like circumstances, and individuals are not herein taxed on their capital, but only on such business as they conduct in the Commonwealth.

BENJ. P. WRIGLEY,
JAMES W. M. NEWLIN,
Attorneys for Exceptants.

To proth'y common pleas, Dauphin county.

(Endorsement on exceptions:) Commonwealth *v.* Pembina Consolidated Silver Mining Company. Exceptions. Filed Mar. 19th, 1883.

APRIL 2ND, 1883.

The exceptions are overruled for the reasons already given. The exception based on the fourteenth amendment to the Constitution of the United States raises a point which is not in the case, no specification of objection having been filed raising this question.

J. W. SIMONTON, *P. J.*

Among the records of the court of common pleas of Dauphin county, Pa., to No. 454, April term, A. D. 1882, it is contained as follows, to wit:

Appearance. Docket Entry.

18 April Term, A. D. 1882. Mar. 8, 1882.

COMMONWEALTH OF PENNSYLVANIA
v.
PEMBINA CONSOLIDATED SILVER MINING & MILLING CO. } 454.

Appeal from the settlement of the auditor general and State treasurer.

Palmer.
Wrigley.

Mar. 3d, 1882.—Appeal and specifications of objections & bond filed.

Dec. 19, 1882.—Narr. and copy of account filed.

Dec. 19th, 1882.—Defendant pleads "*nil debit.*"

Dec. 19th, 1882.—Agreement filed to dispense with trial by jury and to submit to the decision of the court, subject to a writ of error.

Mar. 6th, 1883.—Opinion and finding of the court filed deciding that there is due the Commonwealth by defendant the sum of four hundred and forty-seven $\frac{12}{100}$ dollars ($447.12). Exit notice.

Mar. 19th, 1883.—Exceptions on part of defendant filed.

April 2d, 1883.—Exceptions overruled for the reasons already given. The exception based on the fourteenth amendment
19 to the Constitution of the U. S. raises a point which is not in the case, no specification of objection having been filed raising this question.

Same day.—Judgment entered on the opinion and finding of the court.

April 19th, 1883.—Writ of error from the supreme court received and filed.

Certified.

[Seal of the Court of Com. Pleas of Dauphin Co.]

E. B. MITCHELL, *Proth'y.*

Writ of Error.

MIDDLE DISTRICT OF PENNSYLVANIA:

[Seal of the Supreme Court of Pennsylvania, Middle Dist.]

The Commonwealth of Pennsylvania to the justices of the court of common pleas for the county of Dauphin, Greeting:

Because in the record and process and in rendering the judgment in a certain plaint which was in our said court before the judges of the same court by our writ, between The Pembina Consolidated Silver Mining and Milling Company, plaintiff in error, and The Commonwealth of Pennsylvania, defendant in error,
20 as it is said, manifest error hath intervened, to the great damage of the said plaintiff in error, as by complaint of the same plaintiff in error we have received information, we, willing that if any error be therein it should be corrected and that speedy justice be done to the parties in this part, do command you that if judgment, as it is said, be rendered in the said plea, then the record and process and all things touching the same, under your seals, distinctly and openly, you have before the justices of our supreme court of Pennsylvania, at a supreme court to be held at Harrisburg, in and for the middle district of said Commonwealth, on the 21st Monday following 1 Mon. of Jan., 1883, being the first Monday of the term, and this writ, that, the record and process aforesaid being inspected, we may further cause to be done what of right and according to our laws and customs ought.

Witness the Hon. Ulysses Mercer, doctor of laws, chief justice of our supreme court, at Harrisburg, the 19th day of April, in
21 in the year of our Lord one thousand eight hundred and eighty-three, and of the Commonwealth the one hundred and seventh.

WILLIAM PEARSON,
Prothonotary.

(Endorsement on writ:) Supreme court, middle district. No. 31. May term, 1883. Pembina Consolidated Silver Mining and Milling Co., plaintiff in error, *v.* Commonwealth of Pennsylvania, defendant in error. Writ of error to the court of C. P. for the county of Dauphin. No. 454. April term, 1882. Returnable the 21 Mon. foll. 1 Mon. of Jan., 1883. Rule on the defendant in error to appear and plead on the return day of the writ. N. B.—20 days' notice to the parties or counsel below is necessary to compel an appearance. Filed in supreme court May 29, 1883.

I certify that recognizance in error in $100.00, with James W. Latta and Lewis C. Green as bail, has been filed in the supreme court.

WILLIAM PEARSON,
Prothonotary.

Filed in Dauphin com. pleas April 19, 1883.

April 19, 1883.—Service of the within writ accepted.

ROBERT SNODGRASS,
Dep'ty Att. Gen'l.

The record and process and all things touching the same,
22 so full and entire as before us they remain, to the honorable the judges of the supreme court of the Commonwealth of Pennsylvania, sitting in and for the middle district, we certify and send, as within we are commanded.

J. W. SIMONTON, *P. J.* [L. S.]

In the Supreme Court of Pennsylvania in and for the Middle District of said Court.

At a supreme court of the State of Pennsylvania, sitting in and for the middle district of said court, at the city of Harrisburg, Pennsylvania, on the 21st Monday following 1st Monday of Jan., A. D. 1883—present, the Hon. Ulysses Mercer, chief justice; Isaac G. Gordon, Edward M. Paxson, John Trunkey, James P. Sterritt, Henry Green, and Silas U. Clark, justices, and William Pearson, prothonotary, of the said supreme court—among the records of the said supreme court of Pennsylvania in and for the said middle district, to May term, A. D. 1883, No, 31, it is contained as follows, to wit:

Docket Entries.

Writ of Error to the Court of Common Pleas of Dauphin County. April Term, 1882.

23 PEMBINA CONSOLIDATED SILVER MINING AND MILLING COMPANY, Plaintiff in Error and Defendant below,
v.
COMMONWEALTH OF PENNSYLVANIA, Defendant in Error and Plaintiff Below. } No. 454.

No. 31. May term, 1883.

1883, April 19.—*Præcipe*, affidavit, and recognizance filed. *Eo dil.* Exit writ of error to said court of common pleas of Dauphin county. Returnable 21 Monday following 1 Monday of Jan., A. D. 1883.

1883, May 2.—Assignments of error filed.

" " 24.—Record returned and filed.

" " 29.—Argued.

" Oct. 1.—Judgment affirmed *per curiam.*

1883, Oct. 6.—Record remitted to the court of common pleas of Dauphin.

1883, Oct. 15.—Writ of error from the Supreme Court of the United States and bond in the penal sum of one thousand dollars, approved by Joseph P. Bradley, justice of the Supreme Court of the United States, received and filed.

Certified from the record.

[Seal of the Supreme Court of Pennsylvania, Middle District, 1776.]

WILLIAM PEARSON,
Prothonotary.

24 *Opinion of the Supreme Court of Pennsylvania, Middle District.*

PEMBINA CONSOLIDATED MINING AND MILLING CO.
v.
COMMONWEALTH. *Per curiam:*

Error to common pleas of Dauphin county.

The learned judge correctly held the plaintiff in error to be a foreign corporation within the meaning of the act of 7th June, 1879. For all purposes of taxation all corporations not incorporated by this State are designated as foreign corporations. Two classes of corporations only are recognized—one incorporated by this State, the other incorporated by any other State or country. This license fee is a tax within the meaning of the statute, and is uniform on all corporations of like character having an office within this State. The law imposing it is not in conflict with the Constitution of the United States nor with the constitution of this State.

Judgment affirmed.

25 (Endorsement on opinion:) No. 31. May T., 1883. Pembina Consolidated Silver Mining and Milling Company *v.* Commonwealth. Error to common pleas of the county of Dauphin. Judgment affirmed *per curiam.* Filed Oct. 1, '83.

Remittitur.

MIDDLE DISTRICT OF PENNSYLVANIA, *sct:*

[Seal of the Supreme Court of Pennsylvania, Middle Dist.]

The Commonwealth of Pennsylvania to the justices of the court of common pleas for the county of Dauphin, Greeting:

Whereas by virtue of our writ of error from our supreme court of Pennsylvania in and for the middle district, returnable in the said court on the 21 Monday following 1 Monday of Jan., in the year of our Lord one thousand eight hundred and eighty-three, a record was brought into the same court of a judgment rendered against the Pembina Consolidated Silver Mining and Milling Co., plaintiff in error, at the suit of the Commonwealth of Pennsylvania, defendant in error, and it was so proceeded in our supreme court
26 that the said judgment was affirmed, and the record and proceedings thereupon, and all things concerning the same, were (agreeably to the directions of the act of Assembly in such cases made and provided), ordered by the said supreme court to be remitted

to the court of common pleas for the county of Dauphin aforesaid, as well for execution or otherwise as to justice shall appertain: wherefore we remit you the record of the judgment aforesaid and the proceedings thereupon in order for execution or otherwise as aforesaid.

Witness the Hon. Ulysses Mercer, chief justice of our supreme court, at Harrisburg, the 6th day of October, in the year of our Lord one thousand eight hundred and eighty-three.

WILLIAM PEARSON,
Prothonotary.

(Endorsement on remittitur:) No. 31. May term, 1883, supreme court of Pennsylvania. Pembina Consolidated Silver Mining and Milling Company, plaintiff in error, *v.* Com. of Penna., defendant in error. Remittitur to Dauphin county.

27 *Præcipe for Writ of Error Affidavit.*

In the Supreme Court of Pennsylvania for the Middle District.

PEMBINA CONSOLIDATED SILVER MINING AND MILLING COMPANY, Plaintiff in Error and Defendant Below,

v.

COMMONWEALTH OF PENNSYLVANIA, Defendant in Error and Plaintiff Below.

Surwrit of error to the court of common pleas for the county of Dauphin.

Issue writ of error to the court of common pleas for the county of Dauphin to remove record and proceedings in a certain action in said court, No. 454, April term, 1882, in which the said Commonwealth of Pennsylvania is plaintiff and the said Pennsylvania Consolidated Silver Mining & Milling Co. is defendant.

Returnable to next term *sec. reg.*

B. P. WRIGLEY,
J. W. M. NEWLIN,
Att'ys for Appellant.

To William Pearson, Esq., proth'y sup. court.

COUNTY OF PHILADELPHIA, *ss:*

28 James W. Latta, president of corporation pl'ff, being duly sworn, saith the writ of error applied for and purchased in above-entitled case is not intended for delay.

JAMES W. LATTA.

Sworn to and subscribed this 18 day of April, A. D. 1883.

[Seal of Notary Public.]

EDMUND Q. BOWMAN,
Notary Public.

Bond.

Know all men by these presents that we, James W. Latta and Louis C. Greene and the Pembina Consolidated Silver Mining & Milling Company, are held and firmly bound unto the Commonwealth of Pennsylvania in the sum of one hundred dollars, lawful money of the United States, to be paid to said Commonwealth; to which payment, well and truly to be made, we do bind ourselves, our heirs, our executors, our administrators, and every of them, firmly by these presents.

Sealed with our seals and dated the 11th day of April, A. D. 1883.

The condition of this obligation is such that if the said company shall prosecute with effect a certain writ of error taken by the said corporation from a judgment made by the court of common
29 pleas of Dauphin county against the said company to April term, 1882, No. 454, at the suit of it, of the Commonwealth of Pennsylvania, and shall pay to the Commonwealth whatever may be adjudged due to the Commonwealth in said cause for all costs that have accrued in the cause or shall accrue upon the said writ of error, and for the return to the court below of the record with the remittitur, then this obligation to be void; otherwise to be and remain in full force and virtue.

[Seal of the Pembina Consolidated Silver Mining & Milling Co.]

JAMES W. LATTA,
President Pembina Silver Mining & Milling Co.
JAMES W. LATTA. [SEAL.]
LEWIS C. GREEN. [SEAL.]

And now, the 11th day of April, A. D. 1883, the above sureties are approved.

[Seal of Supreme Court of Penna., Eastern Dist.]

CHAS. S. GREEN,
Prothonotary Supreme Court, E. D.

(Endorsement on *præcipe*, affidavit, and bond:) No. 31. May term, 1883. Pembina Consolidated Silver Mining and Mill-
30 ing Co., pl'ff in error, *v.* Commonwealth of Pennsylvania, defendant in error. *Præcipe*, affidavit, and recognizance for writ of error. Filed in S. C. April 19, 1883.

Assignments of Error.

The court erred:

First. In overruling the appellant's first exception, which was as follows:

I. The court erred in deciding that defendants are "a foreign corporation" within the meaning of the revenue act of June 7, 1879.

Second. In overruling appellant's second exception, which was as follows:

II. The learned court erred in deciding that the tax and penalty

claimed are not in contravention to article 9, section 1, of the constitution of Pennsylvania.

Third. In overruling appellant's third exception, which was as follows:

III. The learned court erred in deciding that the tax and penalty are not void, as being contrary to the Constitution of the United States;

31 (*a.*) And are not an attempt to tax a franchise not granted by the Commonwealth of Pennsylvania;

(*b.*) Nor an attempt to tax property not within its jurisdiction;

(*c.*) Nor an attempt to tax business not carried on within its jurisdiction;

(*d.*) Nor an attempt to tax interstate commerce;

(*e.*) Nor an attempt to regulate interstate commerce.

Fourth. In overruling appellant's fourth exception, which was as follows:

IV. The court erred in rejecting the appellant's fourth point of charge, namely, that the act of a tax and penalty sought to be imposed infringe upon the provisions of the fourteenth amendment to the Constitution of the United States, in this:

(*a.*) The appellant is a person within the meaning of that section;

(*b.*) The tax and penalty are void thereunder, because therein the appellant is denied "the equal protection of the laws," because—

32 (1.) Another class of foreign corporations, to wit, foreign insurance companies, is taxed on more favorable terms, which is an unlawful discrimination against appellant.

(2.) A corporation, on its property and business, can only be taxed on the same terms as individuals in like circumstances, and individuals are not herein taxed on their capital, but only on such business as they conduct in the Commonwealth.

Fifth. The learned court erred in deciding that the exceptions based on the fourteenth amendment to the Constitution of the United States raised a point which is not in the case, no specification of objection having been filed raising this question.

S. C., Middle District. May T., 1883.

PEMBINA CONSOLIDATED SILVER MINING AND MILLING CO. *v.* COMMONWEALTH OF PENNSYLVANIA. } No. 31.

To proth'y S. C.:

The plaintiff in error files the above assignments of error.

April 30th, 1883.

J. W. M. NEWLIN, *For Pl'ff.*

To Wm. Pearson, proth'y S. C.

33 *Copy of Writ of Error Bond.*

Know all men by these presents that we, the Pembina Consolidated Silver Mining — and N. Ferree Lightner and Lewis C. Green, are held and firmly bound unto the Commonwealth of Pennsylvania in the full and just sum of one thousand dollars, to be paid to the said Commonwealth of Pennsylvania or her certain attorney; to which payment, well and truly to be made, we do bind ourselves, our successors, heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this twelfth day of October, in the year of our Lord one thousand eight hundred and eighty-three.

Whereas lately, at a court of common pleas of Dauphin county, in the State of Pennsylvania, judgment was entered against the said The Pembina Consolidated Silver Mining and Milling Company at the suit of the said Commonwealth of Pennsylvania,
34 of April term, 1882, No. 454, which judgment was afterwards affirmed by the supreme court of the State of Pennsylvania in a certain plea and suit in said court, of May term, 1883, No. 31; and the said The Pembina Consolidated Silver Mining and Milling Company having obtained a writ of error to the Supreme Court of the United States to reverse said judgment rendered in the last above entitled action, and having filed a copy thereof in the office of the prothonotary of said court, and a citation directed to said Commonwealth of Pennsylvania, citing and admonishing her to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October, A. D. 1884, next ensuing: Now, the condition of this obligation is such that if the said The Pembina Consolidated Silver Mining and Milling Company shall prosecute their
35 said writ of error to effect and answer all damages and costs if they shall fail to make their plea good, then the above obligation to be void; else to be and remain in full force and virtue.

Sealed and delivered in the presence of—

JAMES W. LATTA, *President.* [SEAL.]
N. FERRE LIGHTNER. [SEAL.]
LEWIS C. GREEN. [SEAL.]

[Seal of Pembina Consolidated Silver Mining and Milling Co.]

Attest: LEWIS C. GREEN, *Secretary.*

STATE OE PENNSYLVANIA, } ss:
County of Philadelphia, }

Before me, Chas. S. Green, prothonotary of the supreme court of Pennsylvania, E. D., personally came N. Ferree Lightner and Lewis C. Green, the obligors in the foregoing bond, and who, being severally sworn according to law, did depose and say, each for him-
36 self, respectively, that he, the said N. Ferree Lightner, is the owner of property in the State of Pennsylvania worth, over and above all his liabilities, three thousand dollars; and he, the

said Lewis C. Green, is the owner of property in the State of Pennsylvania worth, over and above all his liabilities, one thousand dollars.

N. FERRE LIGHTNER.
LEWIS C. GREEN.

Sworn and subscribed before me this 12 day of October, 1883.
[Seal of the Supreme Court of Pennsylvania, Eastern District.]

CHAS. S. GREEN,
Prothonotary of Supreme Court of Pennsylvania, E. D.

CLERK'S OFFICE, U. S. CIR. CT.,
E. DIST. OF PENNA., *October* 12, 1883.

I, Samuel Bell, clerk circuit court United States, eastern district of Pennsylvania, certify that upon careful enquiry I consider the sureties in the foregoing bond to be ample and sufficient.

37 SAMUEL BELL.

The within bond is approved as a supersedeas to execution in the judgment referred to therein.
Oct. 13, 1883.

JOSEPH P. BRADLEY,
Asso. Justice Sup. C't U. S.

Endorsement on back: No. 31. May term, 1883. Pembina Consolidated Silver Mining and Milling Co. *v.* Commonwealth of Pennsylvania. Writ of error bond. Filed in S. C. of Penna. Oct. 15, 1883.

Agreement to Amend Record.

(Copy of amendment of record.)

PEMBINA CONSOLIDATED SILVER MINING AND MILLING COMPANY
v.
COMMONWEALTH OF PENNSYLVANIA.

It is agreed that the record in the proceedings in the court of common pleas of Dauphin county, removed to the supreme
38 court of Pennsylvania, and now on writ of error to the Supreme Court of the United States, be amended by inserting therein the following points of charge submitted by the counsel for the said corporation to the court of common pleas of Dauphin county December 19, 1882:

Points of Charge.

I. That the defendants are not a foreign corporation within the meaning of the revenue act of June 7, 1879.

II. That the tax and penalty claimed are in contravention of art. 9, sec. 1, of the constitution of Pennsylvania.

III. That the tax and penalty are void, as being contrary to the Constitution of the United States, because they—

(*a.*) Are an attempt to tax a franchise not granted by the Commonwealth of Pennsylvania.

(*b.*) And an attempt to tax property not within its jurisdiction.

(*c.*) And an attempt to tax business not carried on within its jurisdiction.

39 (*d.*) And an attempt to tax interstate commerce.

(*e.*) And an attempt to regulate interstate commerce.

The court negatived all the above points.

The appellant also submitted the following additional points, asking the court to charge—

IV. That the act of June 7, 1879, and the tax and penalty sought to be imposed thereunder infringe upon the provisions of the fourteenth amendment to the Constitution of the United States, in this:

(*a.*) The appellant is a person within the meaning of that section.

(*b.*) The tax and penalty are void thereunder, because therein the appellant is denied "the equal protection of the laws," because—

1. Another class of foreign corporations, to wit, foreign insurance companies, is taxed on more favorable terms, which is an unlawful discrimination against appellant.

40 2. A corporation or its property and business can only be taxed on the same terms as individuals in like circumstances, and individuals are not herein taxed on their capital, but only on such business as they conduct in the Commonwealth.

The court negatived the said last-mentioned point, and also held that the question raised therein could not be considered, because the same had not been set forth in the specifications of appeal filed with the auditor general.

ROB'T SNODGRASS,
Dep'ty Att'y Gen'l,
For LEWIS C. CASSIDY,
Attorney General.
JAMES W. M. NEWLIN,
For Pembina M. & M. Co.

(Endorsement on back:) No. 31. May term, 1883. Com.
41 *v.* Pembina M. & M. Co. Stipulation as to points of charge. Filed Sept. 29, 1884.

And now here, on this 15th day of October, A. D. 1883, the said The Pembina Consolidated Silver Mining and Milling Company produced to the supreme court of Pennsylvania here the writ of the United States for the correcting of errors of and upon the premises, commanding the record and proceedings aforesaid of the judgment aforesaid so as aforesaid rendered, with all things touching the same, to be transmitted to the Supreme Court of the United States to be held at the city of Washington on the second Monday of October next, which said writ of error is hereunto annexed.

42 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the chief justice and judges of the supreme court of the Commonwealth of Pennsylvania, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said supreme court before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit, between The Pembina Consolidated Silver Mining and Milling Company, plaintiff in error, and The Commonwealth of Pennsylvania, defendant in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or
43 statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said The Pembina Consolidated Silver Mining and Milling Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, at Philadelphia, the thir-
44 teenth day of October, A. D. 1883, and in the 108th year of the Independence of the said United States.

[Seal U. S. Circuit Court E. D. Pennsylvania.]

SAMUEL BELL,
Clerk Circuit Court U. S.

45 [Endorsed:] The Pembina Consolidated Silver Mining & Milling Co. *vs.* The Commonwealth of Pennsylvania. Writ of error to supreme court of Pennsylvania. Filed in S. C. of Penna. Oct. 15th, 1883.

46 In pursuance whereof, and according to the form and effect of the act of Congress in such case made and provided, a transcript of the record and proceedings of the judgment aforesaid so as aforesaid rendered, with all things relating to the same, together with the said writ of error, are hereby transmitted to the said Supreme Court of the United States accordingly.

STATE OF PENNSYLVANIA, }
County of Dauphin, } *ss:*

In testimony that the foregoing, contained on pages one to forty-six, inclusive, is a full, true, and correct copy of the record and proceedings of the supreme court of Pennsylvania, the highest court of law and equity in the State of Pennsylvania, in the case lately depending therein to No. 31, May term, 1883, middle district, wherein the Pembina Consolidated Silver Mining and Milling Com-
47 pany was plaintiff in error and the Commonwealth of Pennsylvania was defendant in error, I have hereunto subscribed my name and affixed the seal of the said supreme court this thirtieth day of September, A. D. 1884.

[Seal of the Supreme Court of Pennsylvania, Middle District, 1776.]

WILLIAM PEARSON,
Prothonotary of the Supreme Court of Pennsylvania, Middle District.

Endorsed on cover: Pennsylvania supreme court. No. 189. The Pembina Consolidated Silver Mining and Milling Company, plaintiff in error, *vs.* The Commonwealth of Pennsylvania. Filed 28th November, 1884.

IN THE

Supreme Court of the United States.

WRIT OF ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

OF OCTOBER TERM, 1884. No. 1232.

Pembina Consolidated Silver Mining and Milling Company,

Plaintiff in Error,
(Plaintiff below.)

vs.

The Commonwealth of Pennsylvania,

Defendant in Error,
(Defe dant below.)

PAPER-BOOK OF THE PLAINTIFF IN ERROR.

JAMES W. M. NEWLIN,
For Appellant.

EURE & MIFFETRIDGE, PRS. PHILADA.

In the Supreme Court of the United States.

WRIT OF ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

OF OCTOBER TERM, 1884. No. 1232.

PEMBINA CONSOLIDATED SILVER MINING AND MILLING COMPANY,
Plaintiff in Error,
(Plaintiff below),

vs.

THE COMMONWEALTH OF PENNSYLVANIA,
Defendant in Error,
(Defendant below.)

PAPER-BOOK OF THE PLAINTIFF IN ERROR.

This is a writ of error to a judgment of the Supreme Court of Pennsylvania, affirming the validity of a statute of that State, which was alleged to be repugnant to the Constitution of the United States.

ABSTRACT OF THE CASE.

The Pembina Consolidated Silver Mining and Milling Company was incorporated under the laws of the State of Colorado on the thirty-first day of May, 1881, with an authorized capital stock of one million dollars, for the purpose of carrying on a general mining and milling business in the said State of Colorado.

The principal office of the said corporation is in Alpine, Colorado, and the said corporation, since the first day of July, A. D. 1881, have had, and still have, an office in the city of Philadelphia, State of Pennsylvania, "for the use of their officers, stockholders, agents and employees."

This corporation

(1) Has no part of its capital stock invested in Pennsylvania.

(2) Uses no part of its capital stock, or the investments thereof, in Pennsylvania.

(3) Uses no franchise whatever in Pennsylvania.

(4) Transacts no business whatever in Pennsylvania.

Upon this state of facts the Auditor-General and State Treasurer assessed a tax against the Company October 31, 1881, for office license under the Sixteenth Section of the Act of June 7, 1879, from July 1, 1881, to July 1, 1882, at the rate of one-fourth mill on each dollar of authorized capital stock, $250 00

And penalty for failure to take out license, 125 00

$375 00

The company appealed from this taxation (*inter alia* because it is repugnant to the Constitution of the United States) to the Court of Common Pleas of Dauphin County,

which affirmed the validity of the same, and thereupon the Company took a writ of error to the Supreme Court of Pennsylvania, which affirmed the judgment of the Court below, and to this final judgment of the Supreme Court of Pennsylvania the writ of error herein has been sued out.

The title of the said Act of Assembly of Pennsylvania, approved June 7, 1879, is "an Act to provide revenue by taxation."

The section under which the disputed tax is claimed reads as follows:

"*Section* 16. That from and after the first day of July, A. D. 1879, no foreign corporation, except foreign insurance companies, *which does not invest and use its capital in this Commonwealth*, shall have an office or officers in this Commonwealth, for the use of its officers, stockholders, agents, or employees, unless it shall first have obtained from the Auditor-General an annual license so to do; and for said license every such corporation shall pay unto the State Treasury, for the use of the Commonwealth, annually, one-fourth of a mill on each dollar of capital stock which said company is authorized to have, and the Auditor-General shall not issue a license to any corporation until said license fee shall have been paid. The Auditor-General and State Treasurer are hereby authorized to settle and have collected an account against any company violating the provisions of this Section for the amount of such license fee, together with a penalty of fifty per centum for failure to pay the same. *Provided*, That no license shall be necessary for any corporation paying a tax under any previous section of this Act, or whose capital stock or a majority thereof is owned or controlled by a corporation of this State which does pay a tax under any previous section of this Act."

This company is not within the *proviso* of section 16 of the act in question, as it pays no tax under "any previous section thereof."

In Pennsylvania foreign corporations have always been allowed to exercise their franchises, transact business, and use and invest their capital stock in the State, subject only as to real estate to certain restrictions not important to be here considered.

The Legislature has subjected them to taxation from time to time upon their franchises exercised, and on their capital stock used, and business transacted *within the State.*

Under the State of Pennsylvania Revenue Act of June 7, 1879, foreign corporations (except insurance companies) are taxed on their capital stock, but only in proportion to the amount invested or used in Pennsylvania.

All domestic and foreign insurance companies are taxed on their premiums received in the State, by State Revenue Act of June 10, 1881, Section 7, which reads as follows:

"*Section* 7. That all insurance companies which shall within thirty days after the approval of this Act, pay into the treasury of this Commonwealth the amount of money claimed by the Commonwealth for taxes upon their gross premiums, for the period of time between the twentieth day of March, Anno Domini, one thousand eight hundred and seventy-seven, and the first day of January, Anno Domini, one thousand eight hundred and eighty-one, together with interest upon the same, shall be liable from and after the first day of January, Anno Domini, one thousand eight hundred and eighty-one, during the continuance of this Act to no taxes upon their premiums, except upon such as were or shall be received from business transacted within this Commonwealth.

These are the only portions of the State Revenue law which bear upon the question at bar.

An Act of the Pennsylvania Assembly, approved March 30, 1811, requires persons assessed by the Auditor General and State Treasurer to give approved security for the payment of the tax, interest and costs, and file specifications of objections thereto before removing a disputed assessment to the Court of Common Pleas of Dauphin County, which has exclusive original jurisdiction thereof.

In the specifications of appeal, the following objections were *inter alia* set forth.

1. That the Sixteenth Section of Act of 7 June, 1879, is in contravention of Article 1, Section VIII, clause 4, of the Constitution of the United States.

2. That the Sixteenth Section of Act of 7 June, 1879, is in contravention of Article IV, Section II, Clause 1, of the Constitution of the United States.

The Company also entered approved security for the payment of any judgment and costs which might be rendered.

The appeal was heard by the Court of Common Pleas of Dauphin County, December 18, 1882, before Hon. John W. Simonton and Hon. John B. McPherson, without a jury.

The corporation admitted the facts hereinbefore set forth, and the contention was wholly upon questions of law:

1. As to the meaning of the statute.

2. Whether it infringed upon the provisions of the Constitution of Pennsylvania.

3. Whether it was repugnant to the Constitution of the United States.

The facts being admitted, the Attorney-General of the State asked for judgment in favor of the State, by virtue of the said Revenue Act of June 7, 1879.

The company thereupon asked judgment in its favor, and in support thereof submitted (*inter alia*) the following:

POINTS OF CHARGE,

And asked the Court to find as matter of law:

III. That the tax and penalty are void, as being contrary to the Constitution of the United States, because they:

(*a.*) Are an attempt to tax a franchise not granted by the Commonwealth of Pennsylvania.

(*b.*) And an attempt to tax property not within its jurisdiction.

(*c.*) And an attempt to tax business not carried on within its jurisdiction.

(*d.*) And an attempt to tax inter-state commerce.

(*e.*) And an attempt to regulate inter-state commerce.

IV. That the Act of June 7, 1879, and the tax and penalty sought to be imposed thereunder, infringe upon the provisions of the Fourteenth Amendment to the Constitution of the United States in this:

(*a.*) The appellant is a person within the meaning of that section.

(*b.*) The tax and penalty are void thereunder, because therein the appellant is denied "the equal protection of the laws," because:

1. Another class of foreign corporations, to wit:—foreign insurance companies,—is taxed on more favorable terms, which is an unlawful discrimination against appellant.

2. A corporation, on its property and business, can only be taxed on the same terms as individuals in like circumstances; and individuals are not herein taxed on their capital, but only on such business as they conduct in the Commonwealth.

The Attorney-General objected to the consideration of point IV, because it was not embodied in the original specifications of appeal filed with the Auditor-General.

The said Court of Common Pleas of Dauphin County, negatived all of the above points of charge, and refused to consider the question raised by point IV, and entered judgment for the Commonwealth for $447.12, for the tax and penalties and interest and Attorney-General's commissions.

Exceptions were filed according to the State practice embodying the same points of charge, and they were overruled by the Court in the following

ORDER OVERRULING EXCEPTIONS.

The learned President Judge endorsed the following memorandum on the exceptions, overruling the same:

"April 2, 1883. The exceptions are overruled for the reason already given. The exception based on the Fourteenth Amendment to the Constitution of the United States raises a point which is not in the case, no specification of objection having been filed raising this question."

OPINION OF THE COURT OF COMMON PLEAS, OF DAUPHIN COUNTY, PENNSYLVANIA.

The following opinion was filed:

By the Court:

"This case was tried by the Court by agreement of the parties.

It is an appeal from a settlement made by the Auditor-General and State Treasurer against defendant, dated October 27, 1881, for a license fee of $250, and penalty for failure to take out license $125, for the period from July 1, 1881, to July 1, 1882, as per Sec. 16, Act June 7, 1879.

Defendant is a Colorado corporation, having an authorized capital of $1,000,000, not doing business in Pennsylvania, but having an office in Philadelphia for the use of its officers and stockholders.

All the questions raised in this appeal have been decided in the opinions filed in 19, January Term, 1883, and 64, January Term, 1882, both tried with this case, and for reasons there given judgment must go against defendant."

The opinion of the Court in No. 64, January Term, 1882, does not refer to the Federal questions. So much of the opinion of the Court of Common Pleas of Dauphin County, in No. 19, January Term, 1883, as refers to the Federal questions is contained in the following extracts:

"It has uniformly been decided that no provision of the Federal Con-"stitution forbids such legislation in regard to foreign corporations "as is here complained of, and we leave the subject with a reference "to a few of the cases in which this doctrine may be found: *Paul* "vs. *Virginia*, 8 *Wall*, 168; *Ducat* vs. *Chicago*, 10 *Wall*, 410; *Thorn* "vs. *Insurance Co.*, 30 *Smith*, 15; *Comth.* vs. *Standard Oil Co.*, 12 "*Weekly Notes*, 293.

"5. It is further objected, however (in No. 106, January Term, "1883) that Sec. 1 of the Fourteenth Amendment to the Constitu-"tion of the U. S. overturns the principle and decisions referred to, "and forbids this legislation because it denies to the defendant 'the "equal protection of the laws.'

"The Supreme Court of the United States is now considering "certain questions of the first importance, arising under this section, "in the case of *San Mateo* vs. *Southern Pacific R. R. Co.*, 13 *Fed.* "*Rep.*, 722, but after a very considerable examination of Justice

"Field's opinion, which is the decision under review, we can find "nothing which affects this controversy. Indeed, we think the "language of the amendment plainly excludes from its operation "the power which the Commonwealth has here exercised. The "words are, 'Nor shall any State * * * deny to any per-"son *within its jurisdiction* the equal protection of the laws.'"

"Conceding, for the present, that a corporation is a 'person,' within the meaning of this provision, is it not clear that until the 'person' has, either actually or in legal intendment, come 'within its jurisdiction,' the right of the State to exclude or impose terms for admission is unimpaired, and that it may still demand from foreign corporations, such payments as this act requires?"

"The policy of the law is for the Legislature alone."

A writ of error was then taken to the Supreme Court of Pennsylvania, wherein were filed *inter alia* the following

ASSIGNMENTS OF ERROR.

The Court of Common Pleas of Dauphin County erred:

Third.—In overruling the appellant's third exception, which was as follows:

III. The learned Court erred in deciding that the tax and penalty are not void as being contrary to the Constitution of the United States.

(*a.*) And are not an attempt to tax a franchise not granted by the Commonwealth of Pennsylvania.

(*b.*) Nor an attempt to tax property not within its jurisdiction.

(*c.*) Nor an attempt to tax business not carried on within its jurisdiction.

(*d.*) Nor an attempt to tax inter-state commerce.

(*e.*) Nor an attempt to regulate inter-state commerce.

Fourth.—In overruling the appellant's fourth exception, which was as follows:

IV. The learned Court erred in rejecting the appellant's fourth point of charge, namely, That the tax and penalty sought to be imposed infringe upon the provisions of the Fourteenth Amendment to the Constitution of the United States in this:—

(*a.*) The appellant is a person within the meaning of that section.

(*b.*) The tax and penalty are void thereunder, because therein the appellant is denied "the equal protection of the laws," because:

(1.) Another class of foreign corporations, to wit, foreign insurance companies, is taxed on more favorable terms, which is an unlawful discrimination against appellant.

(2.) A corporation, on its property and business, can only be taxed on the same terms as individuals in like circumstances; and individuals are not herein taxed on their capital, but only on such business as they conduct in the Commonwealth.

Fifth.—The learned Court erred in deciding that the exceptions based on the Fourteenth Amendment to the Constitution of the United States raised a point which is not in the case, no specification of objection having been filed raising this question.

The Supreme Court of Pennsylvania affirmed the judgment of the Court of Common Pleas of Dauphin County in the following

OPINION OF THE SUPREME COURT OF PENNSYLVANIA.

Per Curiam.

"The learned judge correctly held the plaintiff in error to be a foreign corporation within the meaning of the Act of 7 June, 1879. For all purposes of taxation, all corporations not incorporated by this State are designated as foreign corporations. Two classes of corporations only are recognized—one incorporated by this State, the other incorporated by any other State or country. This license-fee is a tax within the meaning of the statute, and is uniform in all corporations of like character having an office within this State. The law imposing it is not in conflict with the Constitution of the United States nor with the Constitution of this State."

Judgment affirmed.

The writ of error by which the record now before the Court was brought up was sued out to this judgment of the Supreme Court of Pennsylvania, and the plaintiffs in error submit the following

ASSIGNMENTS OF ERROR.

1. The Supreme Court of the State of Pennsylvania erred in affirming the judgment of the Court of Common Pleas of Dauphin County, Pennsylvania.

2. The Supreme Court of the State of Pennsylvania erred in overruling the following assignment of error to the finding of law and judgment of the Court of Common Pleas of Dauphin County, Pennsylvania, viz.: "The Court erred in finding

III. That the tax and penalty are not void, as being contrary to the Constitution of the United States.

(*a.*) And are not an attempt to tax a franchise not granted by the Commonwealth of Pennsylvania.

(*b.*) Nor an attempt to tax property not within its jurisdiction.

(*c.*) Nor an attempt to tax business not carried on within its jurisdiction.

(*d.*) Nor an attempt to tax inter-state commerce.

(*e.*) Nor an attempt to regulate inter-state commerce.

3. The Supreme Court of the State of Pennsylvania erred in overruling the following assignment of error to the finding of law and judgment of the Court of Common Pleas of Dauphin County, Pennsylvania, viz.: "The Court erred in finding

IV. The Act of June 7, 1879, and the tax and penalty sought to be imposed, infringe upon the provisions of the Fourteenth Amendment to the Constitution of the United St8tes in this:

(*a.*) The appellant is a person within the meaning of that section.

(*b.*) The tax and penalty are void thereunder because therein the appellant is denied "the equal protection of the laws," because:

1. Another class of foreign corporations, to wit:—foreign insurance companies,—is taxed on more favorable terms, which is an unlawful discrimination against appellant.

2. A corporation, on its property and business, can only be taxed on the same terms as individuals in like circumstances; and individuals are not herein taxed on their capital, but only on such business as they conduct in the Commonwealth.

3. The Supreme Court of the State of Pennsylvania erred in overruling the following assignment of error to the finding of law and judgment of the Court of Common Pleas of Dauphin County, Pennsylvania, viz.:

"V. The learned Court erred in deciding that the exceptions based on the Fourteenth Amendment to the Constitution of the United States raised a point which is not in the case, no specification of objection having been filed raising this question."

BRIEF OF ARGUMENT ON BEHALF OF THE PLAINTIFF IN ERROR.

Before considering in detail the constitutional questions involved in this case, let us see exactly what the State of Pennsylvania is trying to do with foreign corporations under its Revenue Act of June 7, 1879.

In the first place, it is to be observed that Pennsylvania has always allowed foreign corporations to exercise their franchises, and invest and use their capital stock and transact business in the State.

It is, therefore, not important to consider the question whether a State may or may not at present exclude a foreign corporation from its borders.

It has, of course, been remarked time and again by the Courts that a State may absolutely prohibit a foreign corporation from entering the State, and *therefore* she may impose any terms she sees fit when she grants the privilege. There is, however, no reported case in which a State undertook to actually exclude a foreign corporation from her limits; so that the question of her abstract right to exclude a foreign corporation has really never been before the Courts.

In all the reported cases the State not only permitted the foreign corporations to come into the State, but expressly provided for their taxation in the event of their coming within the State, and the authorities all turn on the validity or invalidity of the particular tax imposed on foreign companies.

When the Courts therefore have assumed that the State might absolutely exclude a corporation, they have passed upon a question not actually before them, and their expressions of opinion however numerous, and however consistently followed, must nevertheless be considered as *obiter dicta.*

Now in Pennsylvania, foreign corporations are encouraged, and they are taxed on their capital stock only in proportion to their investments and business in Pennsylvania. They are (with the exception of foreign insurance companies) placed exactly on a footing with domestic corporations. In each case, the capital stock is valued and taxed as to domestic corporations on the whole amount, and on foreign corporations on the proportion invested in the State. This is perfectly fair.

But with regard to companies situated like the plaintiff in error, the attempted taxation is not only patently unfair but its imposition in the manner claimed is clearly an attempt at extra-territorial taxation, and moreover, denies to this "person" "the equal protection of the laws."

The so-called license fee is not a gross sum, fixed by the Legislature for police purposes, but is a tax for revenue pure and simple, under an act expressed to be for that purpose, and fixed at the rate of a quarter of a mill on each dollar of the *authorized capital,* without any regard to the real value.

The reason for this is apparent on the face of the Act because the State taxes a corporation which brings its capital into the State, and has that capital and its franchise protected by the State on a more favorable basis than a corporation like the plaintiff in error, which has all of its capital invested in Colorado, which transacts all its business in Colorado, and which uses its franchise exclusively in Colorado and merely keeps an office in the State for the convenience of—*i. e.* practically as a place of meeting for

its stockholders, officers, and employees *who may be in the State.*

It is not even claimed by the Commonwealth that the company so much as transfers stock in Pennsylvania.

Therefore the State cannot pretend to tax the capital stock, for no part of it is here, and cannot tax the franchise, for it is not exercised here, nor the business, for that is not conducted here.

Indeed, the Commonwealth states herself out of Court by the very wording of the Sixteenth Section of the Revenue Act in question, by excluding in express terms from its operations the only foreign corporations she can legitimately tax—*i. e.*, those which invest capital or transact business within the State.

It is submitted, therefore, that the tax in question is repugnant to the Constitution of the United States, because

FIRST: **The tax is void, as being an attempt by Pennsylvania to tax**

A franchise not granted by her.

Property not within her jurisdiction.

Business not carried on in her jurisdiction.

These three points may be considered together, and if the Commonwealth's construction of the word "foreign corporation" is adopted, it is very suggestive as to the above objections.

It is a part of the history of the State that her financiers spent many years in trying to enforce extra territorial tax ation. Of course, all such efforts have failed, and this one must share the fate of the rest. Now, it is to be observed that the plaintiff in error not only derives all its corporate powers from the State of Colorado, and none whatever from the State of Pennsylvania, but they do not exercise any of their corporate powers in Pennsylvania. Neither do they

transact any business in Pennsylvania, nor have they any property whatever in the State. The office here is simply a convenience for the stockholders, officers and employees residing in Pennsylvania as a place of meeting.

The corporation or legal entity as such is not in this State, and although some of its officers, stockholders and employees are here, yet they are here simply as individuals, and because the Company pays the rent of an office *for them*, it certainly does not thereby submit *itself* to the taxing power of this State.

The officers and stockholders in using as individuals an office in Pennsylvania, simply as individuals exercise a right which is not derived in any way from the Commonwealth of Pennsylvania.

And this is no license act under the police power. It is an undisguised revenue bill, and seeks to reach not only the actual capital elsewhere invested, but goes a step further to the preposterous length of seeking to tax the authorized capital, which means simply the authority to have a certain capital, that is, the franchise.

Now, as Pennsylvania did not grant this franchise, and as the one conferred by Colorado is not used here, it is not taxable under the guise of a license fee.

A tax on capital stock of a foreign corporation may be justified as a *property* tax; but then it is only on a valuation of that portion of the capital stock which is in the State.

Where a tax is on the whole authorized capital, without regard to value, it constitutes a franchise tax, and not a property tax.

So both these grounds fail.

The only license taxes imposed in Pennsylvania are those imposed on the amount of the business transacted by the holder of the license.

But this corporation transacts no business in the State, and so on none of these grounds can this tax be sustained.

Now, it is submitted to this court that there is no case reported in which the power of the State has been held to reach any corporation not created by her, unless either the franchise is exercised, or some of its property situated, or some of its business transacted in the State seeking to impose the tax.

State Tax on Foreign-held Bonds. 15 *Wallace*, 319.

Field, J.: "The power of taxation, however vast in its "character and searching in its extent is necessarily limited "to subjects within the jurisdiction of the State. These sub- "jects are persons, property, and business. Whatever form "taxation may assume, whether as duties, imposts, excises or "licenses, it must relate to one of these subjects. It is not "possible to conceive of any other, though as applied to them "the taxation may be exercised in a great variety of ways. It "may touch property in every shape, in its natural condition, "in its manufactured form, and in its various transmutations. "And the amount of the taxation may be determined by the "value of the property or its use, or its capacity, or its pro- "ductiveness. It may touch business in the almost infinite "forms in which it is conducted, in professions, in commerce, "in manufactures, and in transportation. Unless restrained "by the provisions of the Federal Constitution, the power of "the State, as to the mode, form, and extent of taxation is un- "limited where the subjects to which it applies are within her "jurisdiction. Corporations may be taxed, like natural per- "sons, upon their property and business."

In the case of *Com.* vs. *Gloucester Ferry Company*, 2 *Outerbridge*, 105, now pending in the Supreme Court of the United States, the tax was justified wholly upon the ground that the Company transacted business in Pennsylvania.

If the present legislative subterfuge is upheld, there is no limit to extra-territorial taxation. If the companies may be taxed at one-fourth of a mill on the authorized capital, any other or higher rate may be charged, and Pennsylvania may levy an indefinite amount in this way.

More than this, what is to prevent Pennsylvania transferring her tax judgment to Colorado, and there selling the appellant's real estate, which is taxed and protected, not by Pennsylvania, but by Colorado?

It is true, that in the recent decision of the Supreme Court of Pennsylvania, of the Standard Oil Company's case, 101 *Penna. State Reports*, 147. Judge Paxson expressed an extravagant opinion of the power of the Commonwealth to erect a Chinese wall around the State by prohibitory licenses or absolute interdiction; but these are only the views of Judge Paxson, and, it is very safe to say, they will never become those of the court. It is submitted that whilst there are general statements in various decisions which give apparent sanction to this idea, they are all *obiter*. In *no case* was there an attempt *to exclude the foreign corporation entirely*. On the contrary, in all the cases, the corporation was admitted, and in all of them either transacted business, or had property, in the State imposing the tax, and in these circumstances the question in each case was whether the State regulation was valid.

It is to be observed here, too, that it is well established, and a universally known fact of which the court will take judicial cognizance that Pennsylvania admits all foreign corporations to her limits, and in this case, in doing the same thing she attempts to impose conditions which are unreasonable and destructive of the very fundamental principles of lawful taxation as distinguished from confiscation.

A review of the decisions of the Supreme Court of the United States will make this very clear.

License cases, 5 *Howard*, 504.

These were cases from Massachusetts, Rhode Island, and New Hampshire. The cases affirmed the right of the State to enact license tax laws, in regard to sale of liquors, but the Judges, though concurring in the judgments affirming the State courts, differed as to their reasons.

Six Justices filed opinions.

These statutes regulated the sale of liquors, but there was nothing whatever in the nature of discrimination, and there is nothing in them which throws any light on the question at bar.

The Lafayette Ins. Co. vs. *French, et al.*, 18 *Howard*, 407.

"A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter State. 13 *Pet.*, 519. This consent may be accompanied by such conditions as Ohio may think fit to impose; and these conditions must be deemed valid and effectual by other States, and by this court, *provided they are not repugnant to the Constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachments by all others, or that principle of natural justice, which forbids condemnation without opportunity for defense.*"

Paul vs. *Virginia*, 8 *Wallace*, 180. This arose under a foreign insurance license tax.

"But the privileges and immunities secured to citizens of each State in the several States, by the provision in question, are those privileges and immunities which are common to the citizens in the latter States under their Constitution and laws by virtue of their being citizens. Special privileges enjoyed by citizens in their own States are not secured in other States by this provision." * * * * *

The resident stockholders and officers of the Pembina Mining Company, by using an office for their personal convenience in Philadelphia, are only exercising the rights which belongs to them, "by virtue of their being citizens."

Same case, *page* 181. * * * "Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as

those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion." * * * *

St. Clair vs. *Cox*, *Morrison's Trans. Supreme Court of U. S.*, *Vol.* 5, p. 422, is consistent with the contention of appellant.

"Formerly it was held that a foreign corporation could not be sued in an action for the recovery of a personal demand outside of the State by which it was chartered. The principle that a corporation must dwell in the place of its creation, and cannot, as said by Chief Justice Taney, migrate to another sovereignty, coupled with the doctrine that an officer of the corporation does not convey his functions with him when he leaves his State, prevented the maintenance of personal actions against it." * * *

So it is here the actual presence in Pennsylvania of some of the officers, employees, and stockholders of the appellant,—no corporate franchise being exercised here,—does not bring the corporate entity within this Commonwealth.

Page 424.—"All that there is in the legal residence of a corporation in the State of its creation consists in the fact that by its laws the corporators are associated together and allowed to exercise as a body certain functions, with a right of succession in its members. Its officers and agents constitute all that is visible of its existence; and they may be authorized to act for it without as well as within the State." * * * * * * *

"A corporation of one State cannot do business in another State without the latter's consent, express or implied, and that consent may be accompanied with such conditions as it may think proper to impose." (Cites *Lafayette Ins. Co.* vs. *French.*) * * * * * * *

Page 425.—"Such condition must not, however, encroach upon that principle of natural justice which requires notice of a suit to a party before he can be bound by it. *It must be reasonable* and the services provided for should be only upon such agents as may be properly deemed representatives of the foreign corporation." * * * * *

Page 427.—"'The corporate entity,' said the court, 'could by no possibility enter the State, and it could do nothing more in that direction than to cause itself to be represented by its officers or agents.'"

In the case then under consideration, the insurance company transacted business in the State of Michigan, through its agents appointed for that purpose, and so was taxable in Michigan.

McCabe vs. *Illinois Cent. R. R., XIII Fed. Rep.*, 830.

"But does it follow from this doctrine that a corporation may not have a legal residence, through its agents, in a State other than the one of its creation, with the assent of the State in which it is so present, for business or other purposes? May it not, when so present, make contracts, commit torts, sue and be sued? And if so, why may it not be deemed to have a legal residence or presence, if you will, so far as the Statute of Limitations is concerned? Is it a strained construction of the word 'residence,' as used in our statute, which leads to a conclusion at once so just and rational? Indeed, the Supreme Court of the United States, in *ex parte Schollenberger*, compelled the Circuit Court of the United States for Pennsylvania, by *mandamus*, to take jurisdiction of certain causes against a foreign corporation, commenced by a citizen of Pennsylvania, and dismissed by the Circuit Court for want of jurisdiction. The ground of this decision was that the foreign corporation was *carrying on business in Pennsylvania*, and had agents there subject to legal process."

Memphis etc., R. R. Co. vs. *Nolan, Comptroller, etc., Vol. XIV, Fed. Rep., page* 532.

A license or privilege tax imposed by a State on the business of an express company engaged solely in commerce between the States, where there is no intention by this means to obstruct or prohibit the business, is not unconstitutional.

"Of course, in analogy to our State adjudications, if, under the disguise of taxing a franchise or privilege, the State should undertake, by excessive taxation, to obstruct or prohibit the business of inter-state commerce, the constitutional provision would protect against it."

SECOND: **The tax is void under the Federal Constitution:**

Because it is an attempt to tax *inter-state commerce.*
Because it is an attempt to regulate *inter-state commerce.*

The business of this company is mining and milling, and is wholly transacted in Colorado. Its annual meetings are held in Colorado, where all of its agents engaged in its chartered business live. As the stock is mainly held in Philadelphia, those who direct the policy of the company do so from this point, and as a matter of convenience to them in corresponding with and directing its active agents in Colorado, the Philadelphia office rented by the company is essential to the success of the business, and the impetus or initiative given in Philadelphia results in the activity in Colorado, and these two constitute commerce, or the operations of trade or business.

Now it is freely admitted that either a license or a tax on the business actually transacted,—if free from unlawful discrimination,—would be perfectly valid. But this is not what the Commonwealth is contending for. Pennsylvania has not in this case enacted a law to tax what is done here

under her own protection—because she knows that no business is done here,—but through the medium of a tax on the *authorized* capital attempts to tax not only the business that is done elsewhere, but also that which *may* be done elsewhere, protected and taxed elsewhere, in case the *authorized* capital should be all subscribed and paid in.

No language could be balder, and no claim could be more futile than this.

The Commonwealth's proposition refutes itself.

Commerce is not limited to exchange of commodities only, but includes the intercourse of nations in each other's produce and manufactures.

Wharton's Law Lexicon.

It is the mutual change of goods, productions or *property of any kind*, between nations or individuals.

Council Bluffs vs. *Kansas City R. R.*, 45 *Iowa.*

Commerce comprehends navigation.

Gibbons vs. *Ogden*, 9 *Wheaton*, 1.

It comprehends the entire commercial intercourse with foreign nations, and among the several States, it embraces navigation, and ships and vessels as the *instruments* of intercourse, and the officers and seamen who navigate them.

People vs. *Brooks*, 4 *Den.*, 469.

Smith vs. *Turner*, 7 *Howard*, 392.

United States vs. *Holliday*, 3 *Wallace*, 417.

It comprehends intercourse by telegraph.

Western Union Tel. Co. vs. *Atlantic Tel. Co.*, 5 *Nev.*, 102.

It comprehends intercourse in *any* and *all* its forms, for the purposes of trade, including transportation, purchase, sale and exchange of commodities between the different States, the power to regulate it embraces all the *instruments* by *which* it may be conducted.

Paul vs. *Virginia*, 8 *Wallace*, 180.

Here the agent of a foreign insurance company doing business in Virginia attempted to evade the State license tax

on the ground that it was a taxation of inter-state commerce. The license was sustained.

Page 183. * * * "The defect of the argument lies in the character of their business. Issuing a policy of insurance is not a transaction of commerce." * * *

"These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale." * * *

This reasoning does not apply to the case at bar.

Mining and milling are certainly operations of commerce, and Pennsylvania may very effectually tax and regulate them through such a license tax as that of the Act of 1879.

Osborne vs. *Mobile*, 16 *Wall*, 481.

The Southern Express Company was an express company chartered by Georgia, and carried on business in Mobile.

The ordinance of Mobile divided Express and Railroad Companies into three classes, paying licenses as follows:

1. doing business extending *beyond* the State, - - - $500.
2. " " " *within* " " - - - - 100.
3. " " " " " City, - - - 50.

Chief Justice Chase: "There was no discrimination in the taxation of Alabama between it and the corporations and citizens of that State. The tax for license was the same by whomsoever the business was transacted. There was nothing in the case, therefore, which brings it within the case of *Ward* vs. *Maryland*.

Welton vs. *State of Missouri*, 1 *Otto*, *p.* 278.

"The general power of the State to impose taxes in the way of licenses upon all pursuits and occupations within its limits is admitted, but, like all other powers, must be exercised in subordination to the requirements of the Federal Constitution."

Page 280.—"Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between the citizens or subjects of other countries, and between the citizens of our country and the citizens of different States. The power to regulate it embraces all the instruments by which such commerce may be conducted. So far as some of these instruments are concerned, and some subjects which are local in their operation, it has been held that the State may provide regulations until Congress acts with reference to them; but where the subject to which the power applies is national in its character, or of such a nature as to admit of uniformity of regulation, the power is exclusive of all State authority."

"*Page* 281.—"The power of the State to exact a license tax of *any amount* being admitted, no authority would remain in the United States or in this court to control its action, *however unreasonable or oppressive.* Imposts operating as an absolute exclusion of the goods would be possible, and all the evils of discriminating State legislation favorable to the interest of one State, and injurious to the interests of other States and countries, which existed previous to the adoption of the Constitution, might follow, and the experience of the last fifteen years shows would follow from the action of some of the States."

Page 282.—"The fact that Congress has not seen fit to prescribe any specific rules to govern inter-State commerce does not affect the question. Its action on this subject when considered with reference to its legislation, with respect to foreign commerce, is equivalent to a declaration *that interstate commerce shall be free and untrammeled.* As the main object of that commerce is the sale and exchange of commodities, the policy thus established would be defeated by discriminating legislation like that of Missouri."

THIRD. The tax is void, under the Fourteenth Amendment to the Constitution of the United States, as a denial of "the equal protection of the laws."

The Fourteenth Amendment to the Constitution of the United States provides that "No State shall make or enforce any law which "shall abridge the privileges or immunities of citizens of the United "States, nor shall any State deprive any person of life, liberty, or "property without due process of law, nor deny to any person "within its jurisdiction the equal protection of the laws."

1. *The defense based on the Fourteenth Amendment can be made, notwithstanding it was not set forth in the specifications of appeal.*

2. *The corporation is "a person" within the meaning of the amendment.*

3. *Its officers, stockholders and employees were and are lawfully within the jurisdiction of the State, and are entitled to its protection.*

4. *The tax is unequal in this, that another class of foreign corporations, namely, that of foreign insurance companies, is taxed only on the basis of business transacted here, and not on authorized capital.*

5. *Because the State, in its license system as to individuals, bases her tax on the amount of the business, and the same rule must be extended to corporations whose charters are not derived from her grant.*

1. THE DEFENCE UNDER THE FOURTEENTH AMENDMENT WAS PROPERLY RAISED ON THE TRIAL.

Before considering the question raised under the Fourteenth Amendment on its merits, it may be well to say a few words in refutation of the proposition advanced in the court below, namely, that inasmuch as this question was not mentioned in the specifications of objection filed with the Auditor-General, the validity of the act under which the tax is sought to be collected, cannot be inquired into in relation to the Federal Constitution.

This assumption may be disposed of effectually in a few words.

The Act of 1811 provides that the appeal filed with the Auditor-General shall contain a specification of the objections to the settlement, and it has been repeatedly ruled that no other objections can be considered. But these decisions relate to questions of fact. Where a question of law is developed on the trial of an appeal it is to be disposed of in the same way as it would upon an ordinary trial between individuals. It is true that specifications of appeal sometimes do advance abstract propositions of law as the basis of defence to the claim for taxes, but they will be found in the decided cases to invariably arise from some question of fact which cannot be ascertained to exist unless the specifications call for an investigation of that question of fact.

But here the unconstitutionality of Section 16, of the Act of June 7, 1879, is apparent on its face, and this act is the foundation of the Commonwealth's claim. She was obliged to bring it forward as the basis of her demand, and as soon as the Commonwealth invoked the aid of this act it was open to attack for its unconstitutionality.

Even had the Act of 1811 provided in the most express terms that every question, both of fact and law, including Federal constitutional questions, must be anticipated and inserted in the specifications of objections, it is submitted that such a requirement, whilst it might be effectual as to all questions of fact, and as to defenses arising under the Constitution and laws of the State, would be void in so far as it would attempt to prevent inquiry into a Federal question arising in a trial on the face of a State statute made the basis of the Commonwealth's claim.

Having passed an act which is contrary to the Federal Constitution, it is wholly beyond the power of the Commonwealth to uphold her void act by surrounding it with any paper walls made by the same legislative power.

The moment the Commonwealth is forced to rest her case upon an act of her Legislature, and make it the foundation of her demand, that moment the statute becomes liable to question at bar—without regard to any rule of practice—for any Federal objection.

It is needless to say that there is no authority which sustains the position assumed by the court below on this part of the case.

2. CORPORATIONS ARE "PERSONS" WITHIN THE MEANING OF THE FOURTEENTH AMENDMENT.

The corporate entity is not in the State—only individuals connected therewith are—but seek to deny the privileges of this amendment to the plaintiff on the ground that it is a corporation, and that a corporation is not a "person" within the meaning of the amendment, would peculiarly merit the condemnation pronounced by *Agnew, J.*, in the case of *Washington Avenue*, 69 *Penna. St. R.*, 362, on refined distinctions against the rights of property: "They [the people] stamped upon the right of private property an inviolability which cannot be frittered away by verbal criticism on each separate clause."

The authorities, however, clearly show that at the time the Fourteenth Amendment was adopted, the word "persons" was perfectly well understood to include artificial as well as natural persons, and they also show that to be the natural—indeed, necessary—construction to be put upon the word as used therein.

Therefore, corporations being "persons" within the meaning of the Fourteenth Amendment, and entitled, the same as natural persons, to the benefits thereof, they cannot be deprived of their property "without due process of law," and the State may not deny to them "the equal protection of the laws," or reach them through resident stockholders.

Every text writer, from *Blackstone* down, has treated of corporations under the general designation of "persons."

Bank of the United States vs. *Deveaux*, 5 *Cranch.*, 61.

This was an action of trespass *vi et armis* brought by the bank in the United States Circuit Court (having a Pennsylvania charter as a citizen of Pennsylvania), against the revenue officers of Georgia, who had seized property of the bank for State taxes.

The question was whether the bank was a "citizen." It was held that it was a citizen for the purpose of jurisdiction. *Marshall, C. J.*, page 65, quotes Coke (2 Inst., 697–703) as to the construction put upon the word "inhabitants," in the Act of 22 Henry VIII., c. 5. This Act required bridges and highways to be maintained by the "inhabitants" of the city, shire, or riding. A distraint for non-payment of taxes therefor was authorized against "every such inhabitant" in "*his* lands, etc."

Lord Coke held "every corporation or body" residing within the city, etc., or owning land there, to be "an inhabitant within the purview of the statute." He also cites, with approval, *Rex* vs. *Gardner*, *Coop.*, 83, wherein Lord Mansfield held a corporation to be an "inhabitant" and "an occupier" within the meaning of a statute imposing poor rates.

He then says: "It is true, as far as these cases go, they serve to show that the corporation itself, in its incorporeal character, may be considered as an inhabitant or an occupier, and the argument from them would be more strong in favor of considering the corporation itself as endowed, for this special purpose, with the character of a citizen, than to consider the character of the individuals who compose it, as a subject which the court can inspect, when they use the name of the corporation for the purpose of asserting their corporate rights. Still, the cases show that this technical definition of a corporation does not uniformly circumscribe its capacities, but that courts for legitimate purposes will contemplate it more substantially."

Society, etc., vs. *New Haven*, 8 *Wheaton*, 464.

This case turned on the meaning of the protection clause (6th) in the Treaty of Peace between Great Britain and the United States.

It protects "*persons*," and provides that "*he* or they may not be damaged in *his* person, liberty, or property."

It was held that an English corporation owning lands in the United States was within the meaning of the treaty.

United States vs. *Amedy*, 11 *Wheaton*, 392.

This is a very strong case, being a criminal prosecution under an Act of Congress, punishing the destruction on the high seas of any ship "with intent or design to prejudice any *person* or *persons* that hath underwritten * * * any policy * * * of insurance thereon."

It was objected that the underwriter, "The Boston Insurance Company" was not a "person" within the meaning of the Act. The objection was overruled.

Story, J., in delivering the opinion of the court, said:—"Another question not raised in the court below has been argued here, and upon which, as it is vital to the prosecution, we feel ourselves called upon to express an opinion. It is, that a corporation is not *a person* within the meaning of the Act of Congress. If there had been any settled course of decisions on this subject in criminal cases, we should certainly, in a prosecution of this nature, yield to such a construction of that Act, but there is no such course of decisions. The mischief intended to be reached by the statute is the same, whether it respects private or corporate persons. *That corporations are in law for civil purposes deemed persons is unquestionable.*

Marshall vs. *Ohio and Balt. R. R. Co.*, 16 *Howard*, 314.

The railroad company sought exemption from Federal jurisdiction on the ground that it was a State corporation. In refuting this, *Grier, J.*, said: "A corporation, it is said, is an artificial person, a mere legal entity, invisible and intangible. This is no doubt metaphysically true in a certain

sense. The inference, also, that such an artificial entity 'cannot be a citizen' is a logical conclusion from the premises, which cannot be denied.

"But a citizen who has made a contract, and has a 'controversy' with a corporation, may also say, with equal truth, that he did not deal with a mere metaphysical abstraction, but with natural persons; that his writ has not been served upon an imaginary entity, but on men and citizens; and that his contract was made with them as the legal representatives of numerous unknown associates, or secret and dormant partners.

"The necessities and conveniences of trade and business require that such numerous associates and stockholders should act by representation, and have the faculty of contracting, suing and being sued, in a factitious or collective name. But these important faculties, conferred on them by State legislation, for their own convenience, cannot be wielded to deprive others of acknowledged rights. It is not reasonable that those who deal with such persons should be deprived of a valuable privilege by a syllogism, or rather sophism, which deals subtly with words and names without regard to things or persons they are used to represent."

Munn vs. *Illinois*, 94 *U. S.*, 103.

This case holds that the words used in the Fourteenth Amendment, not being defined therein, must be construed according to the meaning usage had assigned to them at the time the amendment was adopted.

Sinking Fund Cases, 99 *U. S.*, 718.

Chase, C. J., in delivering the opinion of the Court, said:—"The United States cannot any more than a State interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts; but, equally with the States, they are prohibited from depriving persons or corporations of property without due process of law."

Baldwin vs. *Trustees*, 37 *Maine*, 369.

An Act provided for the taxation of personal property of the "inhabitants" of the State. Held, that corporations were taxable as "inhabitants."

Otis vs. *Ware*, 8 *Gray*, 509.

An Act provided for the taxation of the property of "individuals," and required that "he" should make a sworn return. Corporations were held to be included therein.

People vs. *Utica Insurance Co.*, 15 *Johnson*, 508.

A statute restrained any "person" from doing certain acts. Corporations were decided to be within the Act.

Planters' Bank vs. *Andrews*, 8 *Porter*, 404.

A corporation was held to be a "person" within the meaning of the attachment laws of Alabama.

State vs. *Nashville University*, 4 *Humphreys*, 166.

It was held that corporations were included under a statute providing for the reception of land entries "by all or every person or persons."

County of San Mateo vs. *Southern Pacific Railroad*, *Federal Reporter*, *Vol. XIII*, *p.* 145, *November*, 1882.

This case decides that the word "person" in the Fourteenth Amendment applies to corporations as well as natural persons, and that the provisions in regard to "due process of law," and "the equal protection of the laws," protects them from discrimination in taxation.

Under the Constitution and laws of California, the individual owners of mortgaged real estate are taxed only for its value in excess of the mortgage, and the mortgage is considered as an interest in the land and taxed to the mortgagee. These taxes are imposed through county officers on notice and with opportunity for appeal to local boards of equalization. Railroad companies which run through more than one county in the State, are taxed by the State Board of Equalization. This board meets by law on

the first Monday of May, assesses the property and franchise as an entirety, and without any deduction on account of its mortgages. The assessment is made without any notice to the company, other than the legislative one fixing the first Monday of May as the time of meeting, and no opportunity for appeal is provided. The railroad companies are required to make returns to this board on or before the first Monday of April, stating the condition of their property, etc., on the first Monday of March, just preceding. Taxes on the railroad are divided between the different counties in proportion to the number of miles of road therein, and the assessments are certified by the State Board to the county assessors. The counties collect the State and county tax, and this suit was brought to recover them both. The Supreme Court of the State of California upheld the constitutional and statutory provisions in question, and decided that corporations were not *persons* within the meaning of the Fourteenth Amendment, and that the railroad companies were not entitled to have their mortgages deducted in making the assessments.

Justice Field in deciding against the validity of the California Constitution and statutes, and in refusing to follow the decision of the State Supreme Court, uses this language as to the meaning of "persons" in the Fourteenth Amendment.

"Looking at the object of the amendment, it must be admitted that it was intended primarily for the protection of the rights of natural persons; its language is mainly applicable to them. If is also include artificial persons, as corporations, whenever its language is susceptible of application to them, it must be because the artificial entity is composed of natural persons whose rights are protected in those of the corporation. It may be that the chain which binds the individuals into an artificial body, does not keep them in their united form from the protection of the amendment. Corporations are not citizens; the term applies only to

natural persons, and yet they are treated as citizens within the clause of the Constitution which defines the judicial power of the United States, and declares that it shall extend to controversies between citizens of different States.

"That name indeed" (of the corporation), says Chief Justice Marshall, "cannot be an alien or a citizen, but the persons whom it represents may be one or the other; and the controversy is, in fact and in law, between those persons suing in their corporate character, by their corporate name for a corporate right, and the individual against whom the suit may be instituted. Substantially and essentially the parties in such a case, where the members of the corporation are aliens or citizens of a different State from the opposite party, come within the spirit and terms of the jurisdiction conferred by the Constitution on the national tribunals. Such has been the universal understanding on the subject."

Northwestern Fertilizing Co. vs. *Town of Hyde Park*, 3 *Bissell*, 480.

The Act of Congress of April 20, 1871—to give effect to the Fourteenth Amendment—declares "that any person who under color of any law * * * shall subject any person * * * to the deprivation of any rights * * * * secured by the Constitution of the United States."

Drummond, J., held the corporation plaintiff was a "person" within the meaning of this Act.

He added:

"It seems to me it would be 'sticking in the bark' to "hold that the right of a person to his property should be "protected under these provisions of the Constitution and law "where he was simply an individual, and the rights of the "same person to property, as a member of a corporation, "should not be protected."

CONTRA.

Insurance Company vs. *New Orleans*, 1 *Woods*, 85, *considered.*

In this case a New York corporation contested the validity of a New Orleans ordinance which required foreign companies to pay double the amount of taxation levied on domestic corporations. The claim was resisted as contravening the provisions of the Fourteenth Amendment, the corporation claiming to be a "person" within the meaning thereof.

Circuit Judge Woods rejected the claim, and held that "persons" therein *meant* "natural persons," saying:

"The word *person* occurs three times in the first section, in the following connections:—'All *persons* born or naturalized in the United States,' 'nor shall any State deprive any *person* of life, liberty, or property, etc.;' 'nor shall any State 'deny to any *person* within its jurisdiction the equal protection of the laws.' The complainants claim that this last clause applies to corporations, artificial persons.

"Only natural persons can be born or naturalized; only natural persons can be deprived of life or liberty; so that it is clear that artificial persons are excluded from the provisions of the first two clauses just quoted. If we adopt the construction claimed by complainants, we must hold that the word 'person,' where it occurs the third time in this section, has a wider and more comprehensive meaning than in the other clauses of the section where it occurs. This would be a construction for which we find no warrant in the rules of interpretation. The plain and evident meaning of the section is that the persons to whom the equal protection of the law is secured, are persons born or naturalized, or endowed with life and liberty, and consequently natural and not artificial persons."

The reasoning of the learned judge is purely technical, and bearing in mind that "persons" is a word of much more general signification than the word "citizens," and

recalling the vigorous language in which such great Judges as Marshall, Story and Grier swept away the "sophism "which deals subtly with words and names without regard "to things or persons they are used to represent," it is impossible to believe that the benefits of this amendment will be denied to the entire corporate wealth of the United States, by holding that the framers of the Fourteenth Amendment were ignorant of the meaning of the words they used.

Indeed, in answer to the verbal criticism on the word "born," the words of Waite, C. J., in *Railroad Co.* vs. *Koontz*, 14 *Otto*, 12, are very apt: "A corporation may, for "the purposes of suit, be said to be *born* where by law it is "created and organized, and to *reside* where, by or under "the authority of its charter its principal office is."

The language of the court in this case shows how the true doctrines of the Fourteenth Amendment are being developed by time and new judges.

III. THE "OFFICERS, STOCKHOLDERS AND EMPLOYEES OF THE CORPORATION WERE AND ARE LAWFULLY WITHIN THE JURISDICTION OF THE STATE, AND ENTITLED TO ITS PROTECTION."

The appellant may lawfully maintain an office in Philadelphia for its officers, stockholders and employees resident there.

The Commonwealth cannot exclude the appellant from maintaining such an office in its borders. It may tax its business or property in this State, or may impose an office license tax, but only upon the basis of its business or property, or under the police power for regulation. It cannot set up this unlawful claim for taxes, and construe the refusal of the company to pay it into an unlawful presence in the State.

IV. THE TAX IN QUESTION IS A "DENIAL OF THE EQUAL PROTECTION OF THE LAWS."

As has been said it is conceded that the Commonwealth may lawfully impose an office license tax upon this corporation if it does any business here, but as the Commonwealth granted the company no franchise to tax, and as the company does not exercise its Colorado franchises here, and as it has neither property nor business in this Commonwealth—but simply office facilities for the personal convenience of its officers and employees—it can only be taxed, if at all, on the same basis that an individual may be. For many years all license fees have been graduated according to the amount of business transacted, but in no case has the Legislature ever attempted to base the license fee on the amount of the capital employed out of the State by the person having an office in this State.

There are, in the city of Philadelphia, numerous branch offices of unincorporated commercial firms, having their principal place of business in New York City and other places outside of this Commonwealth.

These branch offices in Philadelphia, pay a mercantile license fee on the business transacted here.

The following cases, it is submitted, show quite conclusively the inequality complained of is not only contrary to the Federal and State Constitutions, but is essentially beyond the taxing power. *Washington Avenue*, 69 *Penna. St. R.*, 362.

Agnew, J.:—

"There is no case in our books wherein the legislative power to tax has been maintained with greator vigor and ability than *Sharpless* vs. *The City of Philadelphia* (9 Harris); yet even there, the Chief Justice admits (page 166), that the exercise of the power may be forbidden by clear implication as well as express restriction. 'It is not every act the Legislature may choose to call a tax law, that is constitutional.' 'The whole public burden,' he contends, 'cannot be thrown

upon a single individual under pretence of taxing him.' This is a concession that taxation has a limit *per se*, and is not always co-extensive with legislative exaction * * * and when the people to guard against transgressions of the higher power delegated by them, declared that these rights are excepted out of the general powers of government, and shall forever remain inviolate, they, for their own safety, stamped upon the right of private property an inviolability which cannot be frittered away by verbal criticism on each separate clause. * * * I admit that where the power to tax is unbounded by any express limit in the constitution, that it may be exercised to the full extent of the public exigency. I concede that it differs from the power of eminent domain, and has no thought of compensation by way of a return for that which it takes and applies to the public good, further than all derive benefit from the purpose to which it is applied. But, neverless, taxation *is* bounded in its exercise by its own nature, essential characteristic and purpose. It must, therefore, visit all alike in a reasonably practicable way, of which the Legislature may judge, but within the just limits of what is taxation. Like the rain, it may fall upon the people in districts and by turns, but still it must be public in its purpose and reasonably just and equal in its distribution, and cannot sacrifice individual right by a palpably unjust exaction. To do so, is confiscation, not assessment; and falls within the clearly implied restriction in the *Bill of Rights.*"

Woodbridge vs. *Detroit*, 8 *Mich.*, 301.

"The general idea conveyed by these provisions is, that taxes shall be assessed according to some ratio or rule of apportionment, so that A shall pay upon a piece of property of a certain value the same amount as B upon a similar piece of property of equal value. To compel individuals to contribute money or property for the public use, without reference to any common ratio, and without requiring the sum paid by one piece of property, or by one person to bear

any relation whatever to that paid by another, would be a forced contribution, not a tax within the sense of that term as applied to the exercise of powers by an enlightened government."

Lexington vs. *McQuillan's Heirs*, 9 *Dana*, 513.

"The Legislature, in the plentitude of the taxing power, *cannot* have constitutional authority to exact from one citizen or even from one county, the entire revenue of the whole Commonwealth. Such an exaction by whatever name the Legislature might choose to call it, would not be a tax, but would be undoubtedly the taking of private property for public use, and which could not be done constitutionally without the consent of the owner or owners, or without retribution of the value in money.

"The distinction between constitutional taxation and the taking of private property for public use by legislative will may not be definable with perfect precision, but we are clearly of the opinion *that whenever the property of a citizen shall be taken from him by the sovereign will, and appropriated without his consent to the benefit of the public, the exaction should not be considered as a tax, unless similar contributions be made by that public itself, or shall be exacted rather by the same public will, from such constituent members of the same community, generally, as own the same kind of property.*"

The doctrine in relation to "uniformity" and "equality" of taxation, as pronounced in the foregoing cases, is followed and sustained in all the standard text-books on the subject of taxation.

It is claimed that under this provision of the Constitution the tax demanded is illegal:—

1. Because the class of subjects intended to be taxed is officers of corporations, as named by the Act. The previous sections of the Act provide for taxation of the earnings, or the stock of corporations as the *class* of *subjects* to be taxed. And this sixteenth section of the same Act, by naming

"*foreign corporations*" as the class of subjects to be taxed for office license thereby exempts other corporations which should under this constitutional provision properly have been included.

In *Exchange Bank* vs. *Hines*, 3 *Ohio*, *p.* 17, it is said: "The Constitution of the United States provides that 'all duties, imports, etc., shall be uniform throughout the United States,' and that that rule of uniformity, therefore, forbids discrimination in *duties*," not as to *different articles*, but as to *localities*, requiring the same *tax* or the same *subject* throughout the United States. But the rule of uniformity as to taxation required by the State Constitution has a direct reference to the *thing* taxed, and forbids discrimination on the burden of the *thing taxed*.

In *People* vs. *Coleman*, 4 *Cal.*, 46, a provision in the Constitution of California, that "all laws of a general nature shall be uniform," was held to mean that laws of this character should as nearly as possible affect persons and property alike.

In *People* vs. *Judge*, 17 *Cal.*, 547, a constitutional provision that "all laws shall be uniform in their operation" was held to intend that the effect of such laws shall be the same upon all persons standing in the same category.

In *Garrick* vs. *State*, 5 *Iowa*, 491, it is held that "uniform operation" in constitutions refers to the practical working and effect of a law.

A statute is general and uniform in its operation when it operates *equally* upon all persons who are brought within the relations and circumstances provided for.

McAunich vs. *Mississippi R. R. Co.*, 20 *Iowa*, 338.
Exchange Bank vs. *Hines*, 3 *Ohio*, 1.

2. Conceding, however, that the class of subjects, as has been claimed by defendants in error, is not the *offices*, but the *foreign corporations*, the tax is, nevertheless, not uniform on all of that class of subjects. While the *rate* of taxation on

all foreign corporations is the same, the other requisite of uniformity, the *mode* of the assessment in its effect and operation is not the same because it is not levied on the *value* of the stock or the amount actually paid in on the stock, but on each dollar of the *authorized* capital stock. Its want of uniformity is plain.

A company may have an authorized capital stock of $10,000,000, on which but $100,000 is paid in, and of which the actual value is but $100,000, while the stock of another company, with an *authorized* capital stock of but $100,000, may well be actually worth $10,000,000. Under this section the first would pay a license tax for office of $2,500, the latter but $25, though the *rate* of taxation is uniform. This inequality is the necessary consequence of the *mode* of assessment provided by the act.

Whatever may be the view taken of the requirements of the Constitution and laws of the State of Pennsylvania on this subject, it is submitted that the tax in question is a denial of "the equal protection of the laws" as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Pearson v. *City of Portland*, 69 *Maine*, 278.

This was an action for damages against the city for injuries sustained by reason of a defective way. The plaintiff was a resident of Cuba, and a statute of Maine provided that a person who was a resident of another country could not maintain an action for damages against any city or town for injuries like those here in dispute, unless like damages could be recovered by the laws of that country in like circumstances. This statute was held unconstitutional, because in conflict with the Fourteenth Amendment of the Constitution of the United States, as denied to the plaintiff "the equal protection of the laws."

It is admitted that the doctrines embraced within this amendment are now only in process of gradual development,

but there is high authority to sustain the view here contended for.

In the case of *San Mateo County* vs. *The Southern Pacific Railroad*, decided in September, 1882, and reported in the Federal Reporter, Vol. XIII, page 145, November, 1882, heretofore quoted in this brief, *Field, J.*, discusses the question at great length, and in a very powerful opinion holds that inequality in taxation is a denial of "the equal protection of the laws," and is therefore within the inhibition of the Fourteenth Amendment.

This part of the brief cannot be more appropriately closed than by quoting from his opinion in the *San Mateo* case.

Field, Justice (*Sawyer, Circuit Judge*, concurring).

"The concluding clause of its first section was designed to cover all cases of possible discriminating and partial legislation against any class, in ordaining that no State shall deny to any person within its jurisdiction the equal protection of the laws. Equality of protection is thus made the constitutional right of every person; and this equality of protection implies not only that the same legal remedies shall he afforded to him for the prevention or redress of wrongs and the enforcement of rights, but also that he shall be subjected to no greater burdens or charges than such as are equally imposed upon all others under like circumstances. No one can, therefore, be arbitrarily taxed upon his property at a different rate from that imposed upon similar property of others, similarly situated, and thus made to bear an unequal share of the public burdens. Property may indeed, be classified and different kinds be subjected to different rates. Real property may be taxed at one rate, and personal property at another. Property in particular cases may be taxed for local purposes, while property situated elsewhere is exempt. License taxes may also vary in amount, according to the calling or business for which they are exacted. But arbitrary distinctions not arising

from real differences in the character or situation of the property, or which do not operate alike upon all property of the same kind similarly situated, are forbidden by the amendment. Equality in the imposition of burdens is the constitutional rule, as applied to the property of individuals, where it is subject to taxation at all; and this imports that a uniform mode shall be allowed in the estimate of its value, and that the contribution exacted shall be in some uniform proportion to such value prescribed according to the nature or position of the property. All State action, constitutional or legislative, infringing upon the enforcement of this rule, must give way before it. Congress in its legislation, since the adoption of the amendment, has recognized this to be the rule. The amendment was adopted in 1868, and in 1870 Congress re-enacted the Civil Rights Act; and to the clause that all persons within the jurisdiction of the United States should enjoy the same rights as white citizens, and be subject only to like punishment, pain and penalties, it added: and be subject only to like "*taxes licenses, and exactions of every kind, and to no other.*" Rev. St. § 1977.

JAMES W. M. NEWLIN,
For Appellants.

125-191

Supreme Court of the United States

OCTOBER TERM, 1887.

No. 189.

In Error to the Supreme Court of Pennsylvania.

The Pembina Consolidated Silver Mining and Milling Company,

vs.

The Commonwealth of Pennsylvania.

BRIEF OF THE DEFENDANT IN ERROR.

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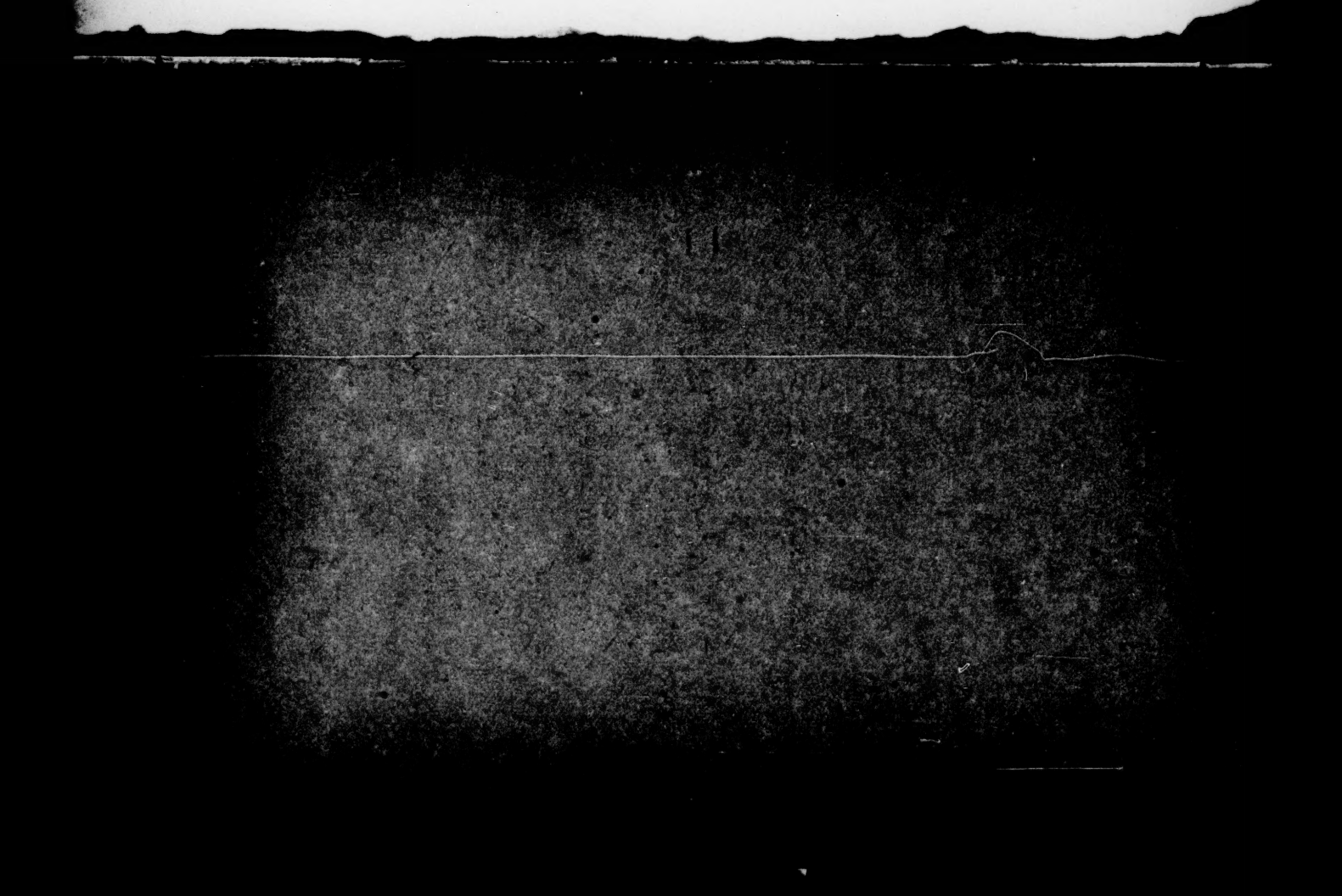

In the Supreme Court of the United States.

October Term, 1887, No. 189.

THE PEMBINA CONSOLIDATED SILVER MINING AND MILLING COMPANY, *Plaintiff in Error*,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

BRIEF OF THE COMMONWEALTH OF PENNSYLVANIA.

In this case the plaintiff in error resists payment of the office license tax imposed on foreign corporations by the act of Assembly of Pennsylvania of June 7, 1879 (P. L., 112). The section under which the disputed tax is claimed reads as follows:

"SECTION 16. That from and after the first day of July, Anno Domini one thousand eight hundred and seventy-nine, no foreign corporation, except foreign insurance companies, which does not invest and use its capital in this Commonwealth, shall have an office or offices in this Commonwealth for the use of its officers, stockholders, agents or employés, unless it shall first have obtained from the Auditor General an annual license so to do, and for said license every such corporation shall pay into the State treasury, for the use of the Commonwealth, annually, one-fourth of a mill on each dollar of capital stock which said

company is authorized to have, and the Auditor General shall not issue a license to any corporation until said license fee shall have been paid. The Auditor General and State Treasurer are hereby authorized to settle and have collected an account against any company violating the provisions of this section for the amount of such license fee, together with a penalty of fifty per centum for failure to pay the same: *Provided*, That no license shall be necessary for any corporation paying a tax under any previous section of this act or whose capital stock, or a majority thereof, is owned or controlled by a corporation of this State which does pay a tax under any previous section of this act."

The act of Assembly cited is the general revenue law of Pennsylvania of 1879. It imposes a tax upon the capital stock of domestic corporations and foreign corporations doing business in the State, substantially at the rate of three mills on the dollar of value of capital stock, measured sometimes by dividends, sometimes by appraisement. The same act taxes the gross premiums and receipts of insurance, transportation and telegraph companies at the rate of eight-tenths of one per centum per annum. Other corporations are taxed three per centum upon annual net earnings or income. By the act of Assembly of April 4, 1873, a tax of three per centum was imposed upon the gross premiums of foreign insurance companies. This act is still in force.

The Pembina Consolidated Silver Mining and Milling Company was incorporated under the laws of the State of Colorado on the 31st day of May, 1881, with an authorized capital stock of $1,000,000, for the purpose of carrying on a general mining and milling business in the State of Colorado. The principal office of the said company is in Alpine, Colorado, and since the first day of July, A. D. 1881, it has had, and still has, an office in the city of Philadelphia "for the use of its officers, stockholders, agents and employés." (Brief of Plaintiff in Error, page 2.) As the stock of the company is mainly held in Philadelphia, those who direct the policy of the company do so from this point, and as a matter of convenience to them, in corresponding with and directing its active agents in Colorado, the Philadelphia

office rented by the company is essential to the success of the business. (*Id.*, page 20).

Pursuant to the 16th section of the act of 1879, the Auditor General and State Treasurer of Pennsylvania settle and account against the plaintiff in error for

License fee, at rate of one-fourth mill on each dollar of authorized capital,	$250 00
Penalty for failure to take out license,	125 00
Due Commonwealth,	$375 00

The settlement under the act of 1879, was according to the practice of the accounting department of Pennsylvania, which has obtained since 1811, under the provisions of an act passed March 30, in that year (*5 Smith's Laws, 228*), and the defendant company appealed from the said settlement pursuant to the provisions of the latter act, § 11:

If any person or persons, body politic or corporate, be dissatisfied with the settlement of his, her or their account by the Auditor General and State Treasurer, he, she or they may appeal therefrom to the Court of Common Pleas of the county in which the seat of government shall then be, and such appeal shall be transmitted by the Auditor General to the clerk of the said court, to be by him entered on record, subject to like proceedings, under the directions of the State Treasurer, as in common suits: *Provided, however*, That the appeal be filed in the office of the Auditor General within sixty days after notice of such settlement, and be accompanied with a specification of objections to the said settlement; and that the person or party appealing shall enter sufficient security before one of the judges of the Court of Common Pleas, within ten days next after such appeal, to prosecute such appeal with effect, and to pay all costs and charges which the Court or arbitrators shall award, and also pay any sum of money which shall appear, by the judgment of the said Court or award of arbitrators, to be due by him, her or them to the Commonwealth: *Provided, nevertheless*, That where any proceedings shall be had against any person or persons, who, upon summons and demand made, in pursuance of this act, shall have refused or neglected to exhibit his, her or their account to the Auditor General, as by this act is directed, such person or persons shall not be allowed any appeal from

the settlement of the accountant officers, but the same shall be final.

The specifications filed on the appeal of the Pembina Company appear on pages 1 and 2 of the transcript of record. They were as follows:

1. That the said sixteenth section of the said act of 7th June, A. D. 1879, entitled "An act to provide revenue by taxation," is void in law, as being in contravention of the provisions of article I, section VIII, clause 4, of the Constitution of the United States, wherein it is provided that "Congress shall have power to regulate commerce with foreign nations and among the several States.

2. That the said sixteenth section of the act of June 7th, 1879, entitled "An act to provide revenue by taxation" is void in law, as being in contravention of the provisions of article IV, section II, clause 1, of the Constitution of the United States wherein it is provided that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States."

3. That the provisions of the said sixteenth section of the act of June 7, 1879, entitled "An act to provide revenue by taxation," are contrary to article IX, section 1, of the Constitution of the Commonwealth of Pennsylvania, wherein it is provided that "all taxes shall be uniform on the same class of subjects within the territorial limits of the authority levying the tax."

4. That the said Pembina Consolidated Silver Mining and Milling Company is not a "foreign corporation," within the meaning of the said act of the General Assembly of the Commonwealth of Pennsylvania, entitled "An act to provide revenue by taxation," approved the 7th day of June, A. D. 1879.

5. That the penalty charged in the said above settlement by the Auditor General and State Treasurer against said Pembina Consolidated Silver Mining and Milling Company was not lawfully due and chargeable against the said corporation at the time the said account was settled against them.

The proceedings upon such an appeal take the form of an action of debt at common law in the Court of Common Pleas of Dauphin county. The cause being at issue an agreement waiving jury trial was filed, and the cause was heard by the court and a finding *nisi* was made against the defendant company. (See transcript of record pp. 6, 7.) To this finding exceptions were filed according to the practice in such cases, and these exceptions raised for the first time in the case the point that the tax in question was in contravention of the fourteenth amendment to the Constitution of the United States. The Common Pleas Court overruled the exceptions and entered final judgment against the defendant, remarking as to that relating to the fourteenth amendment "the exception based on the fourteenth amendment to the Constitution of the United States raises a point which is not in the case, no specification of objections having been filed raising this question." (See transcript of record, p. 8.) The defendant took a writ of error to the Supreme Court of Pennsylvania and there assigned substantially the points embraced in the exceptions below. That court affirmed the judgment of the court below in a short opinion, saying as to the constitutional points raised "the law imposing it (the tax in question) is not in conflict with the Constitution of the United States, nor with the Constitution of this State." (See transcript of record, p. 11.)

A writ of error was then taken to this Court. No assignments of error herein are printed in the transcript. The points relied on by the plaintiff in error are found in its brief.

I

No question under the Fourteenth Amendment to the Constitution of the United States is properly presented.

The Court of Common Pleas of Dauphin county has no jurisdiction to try, upon an appeal, any questions save those presented by the specifications. The Supreme Court of the State passes upon no questions save those properly submitted to the court below. And the jurisdiction of this

court is likewise confined to questions regularly presented by the record. By failure to assert rights under the fourteenth amendment, such rights, if any existed, were waived. The matters of objection to be specified must include matters of law as well as of fact. This is the settled doctrine of the State Court as will appear from an examination of the case of *Delaware, Lackawanna and Western Railroad Company* v. *Commonwealth*, *16 Smith*, *64*, which was a proceeding similar to the present one. In that case the Court said :

" None other remaining questions are raised in the specifications of objections filed, and are not, therefore, here for adjudication The point urged that the company was not required to retain, but only its officers, is not hinted at in the specifications of objections. On the contrary it is expressly admitted to be the duty of the corporation to retain the tax from bondholders by the act of 1864. This must have been an afterthought, but afterthoughts are not allowable by the act of 1811."

The remaining questions referred to in this paragraph extracted from the opinion, were questions of law depending upon the construction of the statute in controversy in that case. The rejected assignments of error, as will appear on page 66 of the report, included, among others, the following, which was assigned in the language of the judge of the court below: ' That the officers of this corporation could be, and were, required to collect the tax, and was their duty to retain it at the time of paying the interest to their creditors; that the statute requiring them to retain and pay it over was a public statute, of which they were bound to take notice, without any warning from the department, and the corporation defendant is now liable for the amount thereof, with interest at the rate of twelve per cent. from the expiration of thirty days from the time of settlement."

In concluding the opinion the language of the Court is as follows: " But an exception was taken to the charge of the learned judge to the jury to find for the Commonwealth, with interest at twelve per cent. instead of six, as allowed

by law, when the settlement was made. This was not made an objection to the settlement when the appeal was taken, and on the principles stated in the outset of this opinion, it is not now a question for examination."

II.

If any question under the Fourteenth Amendment to the Constitution of the United States is presented in this case

Such question is put at rest by *Fire Association* v. *New York*, *119, U. S., 110*, wherein it is held that a foreign corporation is not within the jurisdiction of a State until admitted by such State on a compliance with the condition of admission imposed, which may be the payment of the tax required as a license fee. In the case cited Mr. Justice Blatchford, speaking for the Court, said:

"The provision of the fourteenth amendment, which went into effect in July, 1868, is that no State shall 'deny to any person within its jurisdiction the equal protection of the laws.' The first question which arises is whether this corporation was a person within the jurisdiction of the State of New York, with reference to the subject of controversy and within the meaning of the amendment.

"The defendant, on the assumption that if it was within the jurisdiction of the State of New York, it was, though a foreign corporation, 'a person,' and so entitled to the benefit of the amendment, contends that it was within such jurisdiction. The argument is that it established an agency within the State in 1872, which it had ever since maintained; that it complied, from year to year, with all the requirements and conditions imposed by the laws of the State on foreign fire insurance companies doing business in the State; that it received from year to year certificates of authority from the Superintendent of the Insurance Department, as provided by statute; that, under those circumstances, it was legally within the State and within its jurisdiction; that, being in the State, by permission of the State, continuously from 1872 to 1882, the State imposed on

it while there, in 1882, an unequal and unlawful burden; and that the New York act of 1865 did not come into effect as to Pennsylvania corporations until the Pennsylvania act of 1873 was passed, at which time the defendant had already been a year in the State.

"But we are unable to take this view of the case. In *Paul* v. *Virginia*, 8 Wall., 168, at December term, 1868, a statute of Virginia required that every insurance company, not incorporated by Virginia should, as a condition of carrying on business in Virginia, deposit securities with the State Treasurer, and afterwards obtain a license; and another statute made it a penal offense for a person to act in Virginia as agent for an insurance company not incorporated by Virginia, without such license. A person having acted as such agent without a license, and been convicted and fined under the statute, this court held that there had been no violation of that clause of article 4, section 2, of the Constitution of the United States, which provides that 'the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States;' nor any violation of the clause in article 1, section 8, giving power to Congress 'to regulate commerce with foreign nations and among the several States.' The view announced was, that corporations are not citizens within the first clause cited, on the ground that the privileges and immunities secured to the citizens of each State in the several States, are those which are common to the citizens of the latter States, under their constitutions and laws, by virtue of their being citizens; and that, as a corporation created by a State, is a mere creation of local law, even the recognition of its existence by other States, and the enforcement of its contracts made therein, depend purely on the comity of those States—a comity which is never extended where the existence of the corporation or the exercise of its powers is 'prejudicial to their interests or repugnant to their policy.' And the court, speaking by Mr. Justice Field, said: 'Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be

granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporations entirely, they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion.' As to the power of Congress to regulate commerce among the several States, the Court said, that while the power conferred included commerce carried on by corporations as well as that carried on by individuals, 'issuing a policy of insurance is not a transaction of commerce.' This decision only followed the principles laid down in the earlier cases of *Bank of Augusta* v. *Earle*, 13 Pet., 519, 588, and *Lafayette Ins. Co.* v. *French*, 18 How., 404.

"The same rulings were followed in *Ducat* v. *Chicago*, *10 Wall., 410*, where it was said that the power of a State to discriminate between her own corporations and those of other States desirous of transacting business within her jurisdiction being clearly established, it belonged to the State to determine as to the nature or degree of discrimination, 'subject only to such limitations on her sovereignty as may be found in the fundamental law of the Union.'

"Other cases to the same effect are *Liverpool Insurance Company* v. *Massachusetts*, *10 Wall., 566*; *Doyle* v. *Continental Insurance Company*, *94 U. S., 535*; and *Cooper Manufacturing Compony* v. *Ferguson.*, *113 U. S., 727*."

III.

IF THE FOURTEENTH AMENDMENT APPLIES TO THE CASE OF THE PLAINTIFF IN ERROR, NO RIGHTS OF IT THEREUNDER HAVE BEEN INFRINGED.

No injurious discrimination against the plaintiff in error is shown, either by proof or by citation of taxing statutes. On the other hand it appears that the excepted class of foreign corporations, to wit., foreign insurance companies, pay a tax of three per cent. upon their gross receipts; that foreign corporations doing business in the State of

Pennsylvania, as well as domestic corporations of that State, pay a tax of three mills upon the value of their capital stock; that corporations of Pennsylvania and other States doing business in that State, and engaged in transportation or telegraph business, pay, in addition to tax upon capital stock, a tax upon their gross receipts, and that still other corporations pay a tax upon net earnings. The taxation of each and all of these is at a greater rate than the license tax imposed upon the plaintiff in error, but if the plaintiff in error were taxed at a greater rate than other corporations, it is submitted that it is competent for the Legislature to classify subjects of taxation by the description: "Foreign corporations, except foreign insurance companies, which do not invest and use their capital in this Commonwealth, but (desiring to) have an office or offices in this Commonwealth for the use of their officers, stockholders, agents or employés." Such a designation of subjects of taxation is made in the exercise of the power of apportioning taxation, of which it is well said in *Allen* v. *Drew*, 44 Vermont, 174: "The power of taxation implies apportionment, and when the Legislature have exercised the right and made the apportionment, a court should not assume to declare it void unless the invasion of private right is flagrant and its demonstration clear. The rule is that the limit of equality and reason must be so transcended that the exaction would cease to be a tax or contribution to a common burden and become extortion and confiscation."

As to the rule of equality, it is said by this Court, speaking by Mr. Justice Field, *Stanley* v. *Supervisors of Albany*, 121 U. S., 550: "Absolute equality and uniformity are seldom, if ever, attainable. The diversity of human judgments and the uncertainty attending all human evidence, preclude the possibility of this attainment. Intelligent men differ as to the value of even the most common objects before them, of animals, houses and lands in common use. The most that can be expected from wise legislation is an approximation to this desirable end, and the requirement of equality and uniformity, found in the constitutions of

some States, is complied with when designed and manifest departures from the rule are avoided."

For the purposes of this argument it is not undertaken to define what is the making or enforcement of a law which shall abridge the privileges and immunities of citizens of the United States, because a foreign corporation does not fall within this clause; nor to define what it is to deny to any person within the jurisdiction of a State the equal protection of the laws. It is sufficient for the purpose of this argument that there has been no violation of the settled rules of taxation in the selection of the subject matter of taxation or in the fixing and collection of the tax in question.

IV.

THE PLAINTIFF IN ERROR IS NOT ENGAGED IN INTERSTATE COMMERCE.

It appears on page 2 of brief of Plaintiff in error that the purpose of the corporation is carrying on a general mining and milling business in the State of Colorado. It appears on page 20 of the same brief that the business of this company is mining and milling, and is wholly transacted in Colorado. Its annual meetings are held in Colorado, where all of its agents engaged in its chartered business live. As the stock is mainly held in Philadelphia, those who direct the policy of the company, do so from this point, and as a matter of convenience to them in corresponding with and directing its active agents in Colorado, the Philadelphia office, rented by the company, is essential to the success of the business, and the impetus and initiative given in Philadelphia results in activity in Colorado, and it is gravely contended by the counsel for plaintiff in error that this constitutes commerce among the several States. It is submitted that the argument falls by mere statement of the case.

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